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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~378.~~ 146

THE TOWN OF ROBERTS, PLAINTIFF IN ERROR,

vs.

MATTHEW BOLLES AND M. SHEPARD BOLLES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JUNE 1, 1877.

Marlow

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No. 378.

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1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Friday, the fourteenth day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of our independence the ninety-ninth year.

WILLIAM H. BRADLEY, *Clerk.*

MATTHEW BOLLES AND M. SHEPARD BOLLES
v.
TOWN OF ROBERTS. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss.*

Be is remembered that on the twenty-second day of September, A. D. 1874, came the said plaintiffs, Matthew Bolles and M. Shepard Bolles, by Mess'rs Paddock and Ide, their attorneys, and filed in the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, at Chicago, in the district aforesaid, their bond for costs and præcipe for a writ of summons against said defendant in said entitled cause, which said bond for costs and præcipe are respectively in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

Circuit Court, October Term, A. D. 1874.

M. BOLLES AND CO.
vs.
TOWN OF ROBERTS. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against them. Dated this 21st day of September, A. D. 1874.

PADDOCK AND IDE.

(Endorsed:) Filed Sept. 22d, 1874. Wm. H. Bradley, clerk.

Præcipe.

United States Circuit Court, Northern District of Illinois, October Term, A. D. 1874.

MATTHEW BOLLES AND M. SHEPARD Bolles, partners in business under the firm of M. Bolles and Co.
vs.
TOWN OF ROBERTS. } Assumpsit. Das. $15,000.

3 Issue summons against deft. in above case, directed to marshal of N. D. of Illinois. Returnable to Oct. term, 1874. Lay damages at $15,000 in assumpsit.

Town of Roberts is in Marshal Co., Ills.

To Circuit Clerk. PADDOCK AND IDE,

Sept. 21, 1874. *Plffs.' Attorneys.*

(Endorsed:) Filed Sept. 22d, 1874. Wm. H. Bradley, clk.

And on the same day, to wit, the 22d day of September, A. D. 1874, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal annexed thereto, is in the words and figures following, to wit:

Writ of Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

The Unites States of America to the marshal of the Northern District of Illinois, greeting:

We command you to summon Town of Roberts if found in your district, to be and appear before our judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Matthew Bolles and M. Shepard Bolles, partners in business under the firm of M. Bolles and Co., of a plea of trespass
4 on the case upon promises, to their damage, as they allege, of fifteen thousand dollars, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 22d day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of our independence the 99th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

Know all men by these presents, that I have appointed and by these presents do appoint Samuel J. Taylor my true and lawful deputy to execute the annexed writ, Matthew Bolles et al. vs. Town of Roberts, and to make return of the execution thereof according to law. B. H. CAMPBELL, [SEAL.]

United States Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit: by reading the same to and in the presence and the hearing of Orenge Parret, town clerk of said town of Roberts herein named, on the 26 day of September, A. D. 1874, and also by delivering to him a true copy thereof, not being able to find the supervisor of said town in my district.

5 B. H. CAMPBELL,
United States Marshal,
By SAMUEL J. TAYLOR,
Special Deputy.

Samnel J. Taylor, being duly sworn, deposes and says, that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

JAMES T. RALSTON, [SEAL.]
Notary Public.

Sworn before me, this 29 day of September, A. D. 1874.

(Endorsed:) Filed Oct. 7th, A. D. 1874. Wm. H. Bradley, clerk.

6 Afterwards, to wit, on the 25th day of September, A. D. 1874, said plaintiffs, by their attorneys, filed in said clerk's office their declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. }

Circuit Court, October Term, A. D. 1874.

MATTHEW BOLLES AND M. SHEPPARD BOLLES, PARTNERS in business under firm of M. Bolles & Co., } Assumpsit.
vs.
TOWN OF ROBERTS. }

Matthew Bolles and M. Shepard Bolles, partners in business under the firm of M. Bolles & Co., who are citizens of the State of Massachusetts and the plaintiffs in the above-entitled cause, complain of the town of Roberts, citizens of the State of Illinois and a municipal corporation and township organized and existing under and by virtue of the township organization law of the State of Illinois, and known and called by said name of the town of Roberts, and having their principal place of business at said north-
7 ern district, to wit, at the county of Marshall and State of Illinois, the defendants in this suit in a plea of assumpsit:

For that whereas, heretofore, to wit, on the 7th day of April, A. D. 1871, at said town of Roberts in the district aforesaid, the said town of Roberts, under and by virtue of the power conferred by

an "Act of the general assembly of the State of Illinois incorporating the Hamilton, Lacon and Eastern Railroad Company," and the laws of said state, to wit, "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company," in force March 7, 1867; "An act to authorize the incorporated towns and townships in the counties of Livingston, LaSalle, and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," in force March 5, 1869; and "An act to authorize the counties of Woodford, LaSalle, and Livingston, and the townships, cities, incorporated towns and corporations in said counties to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois," in force March 6, 1867; and by an election held in said town, to wit, March 25th, 1869, issued and delivered to the said Hamilton, Lacon and Eastern Railroad Company, a railroad corporation under and existing by virtue of the acts of the said general assembly of said state first above recited, its written evidence of indebtedness, commonly called a municipal bond, subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, in the words and figures following, to wit:

8 "No. 7. $1,000

United States of America, county of Marshall,
State of Illinois, town of Roberts.

Know all men by these presents, that the town of Roberts, in the county of Marshall and State of Illinois, is indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said town of Roberts promises to pay to the said Hamilton, Lacon and Eastern Railroad Company, or to the bearer hereof, on the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall aforesaid, in the town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the 7th day of April, A. D. 1871, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for one thousand dollars, and all of which are of even date, and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special elec-

tion held for such purpose in said town on the 25th day of
9 March, A. D. 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general assembly of the State of Illinois incorporating said railroad company.

In witness whereof, the supervisor of said town of Roberts has signed this bond, and the clerk of said town has attested the same, on this 7th day of April, in the year one thousand eight hundred and seventy-one.

JOHN NORTON,
Supervisor of the Town of Roberts,
Marshall County, State of Illinois.

Attest—JOSEPH MALEHAM,
Clerk of the Town of Roberts,
Marshall County, State of Illinois.

(On margin:) This bond issued by the town of Roberts, on the 7th day of April, A. D. 1871, and duly recorded by me according to law.

JOSEPH MALEHAM,
Clerk of the Town of Roberts.

And thereby then and there acknowledged itself to be indebted to the said Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of $1,000, which sum the said defendant thereby then and there promised to pay to said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of said municipal bond, on, to wit, the 7th day of April, A. D. 1874, at the office of the treasurer of the county of Marshall, in the town of Lacon, in said State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, 1871, at the rate of ten per cent. per annum, payable annually at the office of said treasurer, on
10 the 7th day of April in each year, on the presentation and surrender of the coupons thereto annexed as they severally become due; (and in which bond it was recited as aforesaid, that said bond is one of a series amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for one thousand dollars, and all of which are of even date, and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town on the 25th day of March, A. D. 1869, in pursuance of the provisions of the laws of the State of Illinois, and of the several acts of the general assembly of the State of Illinois incorporating said railroad company, and to which bond also were annexed certain promissory notes, commonly called coupons or interest-warrants, subscribed by said supervisor and town

clerk, providing for the annual interest secured by said bond, and which have been heretofore detached from said bond; and whereas also, after the delivery of said bond, and the said coupons thereto annexed, to said railroad company, to wit, on said 7th day of April, 1871, at the county of Suffolk, to wit, at the said State of Massachusetts, said railroad company sold, assigned, and delivered said bonds and coupons, for value, to bona fide purchasers, by means whereof the said bonds, so falling due as aforesaid on said 7th day of April, 1874, then and there came into the hands of said plaintiffs as the owners, bearers, and holders thereof, in good faith
11 and for value, prior to said last-named day, and said plaintiffs then and there became and were and are the lawful bearers thereof, of which said defendant then and there had notice, by means whereof the said defendant, the town of Roberts, in consideration of the premises then and there, to wit, on the said 7th day of April, 1871, at, to wit, said town in the said district, promised to pay to said plaintiffs, as the lawful bearers of said bond, the said sum of money therein mentioned, at the time and place in the same mentioned and according to the intent and meaning thereof, which time of payment has long since elapsed, yet the said defendant, though often requested, and though the said bond was duly presented for payment at the office of said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said bond became due and payable as aforesaid, of all which said defendant then and there had notice, have not paid said sum of money in said municipal bond mentioned, nor any part thereof, but to pay the same has refused and still neglects and refuses so to do.

2d count. And whereas also, heretofore, to wit, on the 7th day of April, A. D. 1871, at said town of Roberts, in the district aforesaid, the said town of Roberts, under and by virtue of the power conferred by an "Act of the general assembly of the State of Illinois incorporating the Hamilton, Lacon and Eastern Railroad Company," and the laws of said state, to wit, "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company," in force March 7, 1867; "An act to authorize the incorporated towns and town-
12 ships in the counties of Livingston, La Salle, and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," in force March 5, 1869; and "An act to authorize the counties of Woodford, La Salle, and Livingston, and the townships, cities, incorporated towns and corporations in said counties to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois, in force March 6, 1867, and by an election held in said town, to wit, on March 25th, 1869, issued and delivered to the said Hamilton, Lacon and Eastern Railroad Company, a railroad corporation under and existing by virtue of the act of the said general assembly of said state first above recited, its certain other written

evidence of indebtedness, commonly called a municipal bond, subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, in the words and figures following, to wit:

"No. 8. $1,000.

United States of America, county of Marshall,
State of Illinois, town of Roberts.

Know all men by these presents, that the town of Roberts, in the county of Marshall and State of Illinois, is indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said town of Roberts promises to pay to the said the Hamilton, Lacon and Eastern Railroad Company, or to the bearer hereof, on the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall aforesaid, in the town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the 7th day of April, A. D.
13 1871, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severa[illegible] become due.

This bond is one of a series amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for one thousand dollars, and all of which are of even date and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town on the 25th day of March, A. D. 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general assembly of the State of Illinois incorporating said railroad company.

In witness whereof, the supervisor of said town of Roberts has signed this bond, and the clerk of said town has attested the same, on this 7th day of April, in the year one thousand and eight hundred and seventy-one.

JOHN NORTON.
Supervisor of the Town of Roberts,
Marshall County, State of Illinois.

Attest—JOSEPH MALEHAM,
Clerk of the Town of Roberts,
Marshall County, State of Illinois."

(On margin:) This bond is issued by the town of Roberts, on the 7th day of April, A. D. 1871, and duly recorded by me according to law.

JOSEPH MALEHAM,
Clerk of the Town of Roberts.

And thereby then and there acknowledged itself to be indebted to the said Hamilton, Lacon and Eastern Railroad
14 Company, or bearer, in the sum of $1,000, which sum the said defendant thereby and then and there promised to pay to said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of said municipal bond, on, to wit, the 7th day of April, A. D. 1874, at the office of the treasurer of the county of Marshall, in the town of Lacon, in said State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, 1871, at the rate of ten per cent. per annum, payable annually at the office of said treasurer, on the 7th day of April in each year, on the presentation and surrender of the coupons thereto annexed as they severally became due, and to which bond also were annexed certain promissory notes, commonly called coupons or interest-warrants, subscribed by said supervisor and town clerk, providing for the annual interest secured by said bond, and which have been heretofore detached from said bond: and whereas also, after the delivery of said bond, and the said coupons thereto annexed, to the said railroad company, to wit, on said 7th day of April, 1871, at the county of Suffolk, to wit, at the said State of Massachusetts, said railroad company sold, assigned, and delivered said bonds and coupons for value to bona fide purchasers, by means whereof the said bonds so falling due as aforesaid on said 7th day of April, 1874, then and there came into the hands of said plaintiffs as the owners, bearers, and holders thereof, in good faith and for value, prior to said last-named day, and said plaintiffs then and there became and were and are the lawful bearers thereof, of which said defendant then and there had notice, by means whereof the said defendant, the town of Roberts, in consideration of the premises, then and there, to wit, on the said 7th day of April, 1871, at, to wit, said town in the
15 said district, promised to pay to said plaintiffs as the lawful bearers of said bond the said sum of money therein mentioned, at the time and place in the same mentioned and according to the intent and meaning thereof; which time of payment has long since elapsed, yet the said defendant, though often requestsd, and though the said bond was duly presented for payment at the office of said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said bond became then and there payable as aforesaid, of all which said defendant then and there had notice, have not paid said sum of money in said municipal bond mentioned, nor any part thereof, but to pay the same has refused and still neglects and refuses so to do.

3rd count. And whereas also, heretofore, to wit, on the 7th day of April, A. D. 1871, at said town of Roberts, in the district aforesaid, the said town of Roberts, under and virtue of the power conferred by an "Act of the general assembly of the State of Illinois incorporating the Hamilton, Lacon and Eastern Railroad Company,"

and the laws of said state, to wit, an act to incorporate the Hamilton, Lacon and Eastern Railroad Company, in force March 7, 1867; "An act to authorize the incorporated towns and townships in the counties of Livingston, La Salle, and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," in force March 5, 1869; and "An act to authorize the counties of Woodford, La Salle, and Livingston, and the townships, cities, incorporated towns and corporations in said counties to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois," in force March 6, 1867, and by an election held in said town, to wit,
16 on March 25th, 1869, issued and delivered to the said Hamilton, Lacon and Eastern Railroad Company, a railroad corporation under and existing by virtue of the act of the said general assembly of said state first above recited, its certain other written evidence of indebtedness, commonly called a municipal bond, subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, in the words and figures following, to wit:

"No. 9. $1,000.

United States of America, county of Marshall, State of Illinois, town of Roberts.

Know all men by these presents, that the town of Roberts, in the county of Marshall and State of Illinois, is indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said town of Roberts promises to pay to the said the Hamilton, Lacon and Eastern Railroad Company, or to the bearer hereof, on the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall aforesaid, in the town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the 7th day of April, A. D. 187 , at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for one thousand dollars, and
17 all of which are of even date and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town on the 25th day of March, A. D. 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general

assembly of the State of Illinois incorporating said railroad company.

In witness whereof, the supervisor of said town of Roberts has signed this bond, and the clerk of said town has attested the same, on this 7th day of April, in the year one thousand eight hundred and seventy-one.

JOHN NORTON,
Supervisor of the Town of Roberts,
Marshall County, State of Illinois.

Attest—JOSEPH MALEHAM,
Clerk of the Town of Roberts,
Marshall County, State of Illinois.

(On margin:) This bond was issued by the town of Roberts, on the 7th day of April, A. D. 1871, and duly recorded by me according to law.

JOSEPH MALEHAM,
Clerk of the Town of Roberts.

And thereby then and there acknowledged itself to be indebted to the said Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of $1,000, which sum the said defendant thereby then and there promised to pay to said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of said municipal bond, on, to wit, the 7th day of April, A. D. 1874, at the office of the treasurer of the county of Marshall, in the town of Lacon, in said State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, 1871, at the rate of ten
18 per centum per annum, payable annually at the office of said treasurer, on the 7th day of April in each year, on the presentation and surrender of the coupons thereto annexed as they severally became due, and to which bond also were annexed certain promissory notes, commonly called coupons or interest-warrants, subscribed by said supervisor and town clerk, providing for the annual interest secured by said bond, and which have been heretofore detached from said bond: and whereas also, after the delivery of said bond, and the said coupons thereto annexed, to the said railroad company, to wit, on said 7th day of April, 1871, at the county of Suffolk, to wit, at the State of Massachusetts, said railroad company sold, assigned, and delivered said bonds and coupons for value to bona fide purchasers, by means whereof the said bonds so falling due as aforesaid on said 7th day of April, 1874, then and there came into the hands of said plaintiffs as the owners, bearers, and holders thereof, in good faith and for value, prior to said last named day, and said plaintiffs then and there became and were and are the lawful bearers thereof, of which said defendant then and there had notice, by means whereof the said defendant, the town of Roberts, in consideration of the premises, then and there, to wit, on the said 7th day of April, 1871, at, to wit, said town in the said district,

promised to pay to said plaintiffs as the lawful bearers of said bond, the said sum of money therein mentioned, at the time and place in the same mentioned, and according to the intent and meaning thereof, which time of payment has long since elapsed, yet the said defendant, though often requested and though the said bond was duly presented for payment at the office of said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said bond became then and there payable as aforesaid,
19 of all which said defendant then and there had notice, have not paid said sum of money in said municipal bond mentioned, nor any part thereof, but to pay the same has refused and still neglects and refuses so to do.

4th count. And whereas also, heretofore, to wit, on the 7th day of April, A. D. 1871, at said town of Roberts, in the district aforesaid, the said town of Roberts, under and by virtue of the power conferred by "An act of the general assembly of the State of Illinois incorporating the Hamilton, Lacon and Eastern Railroad Company," and the laws of said state, to wit, "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company," in force March 7, 1867," "An act to authorize the incorporated towns and townships in the counties of Livingston, La Salle, and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," in force March 5, 1869, and "An act to authorize the counties of Woodford, La Salle, and Livingston, and the townships, cities, incorporated towns and corporations in said counties to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois," in force March 6, 1867, and by an election held in said town, to wit, on March 25th, 1869, issued and delivered to the said Hamilton, Lacon and Eastern Railroad Company, a railroad corporation under and existing by virtue of the act of the general assembly of said state first above recited, its certain other written evidence of indebtedness, commonly called a municipal bond, subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, in the words and figures following, to wit:

"No. 10. $1,000.

20 United States of America, county of Marshall,
State of Illinois, town of Roberts.

Know all men by these presents, that the town of Roberts, in the county of Marshall and State of Illinois, is indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said town of Roberts promises to pay to the said the Hamilton, Lacon and Eastern Railroad Company, or to the bearer hereof, on the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall

aforesaid, in the town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the day of , A. D. 187 , at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severally become due. This bond is one of a series, amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from one to thirty inclusive, each of which is for one thousand dollars, and all of which are of even date and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town on the 25th day of March, A D. 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general assembly of the State of Illinois incorporating said railroad company.

In witness whereof, the supervisor of the said town of Rob-
21 erts has signed this bond, and the clerk of said town has attested the same, on this 7th day of April, in the year one thousand eight hundred and seventy-one.

JOHN NORTON,
Supervisor of the Town of Roberts,
Marshall County, State of Illinois.

Attest—JOSEPH MALEHAM,
Clerk of the Town of Roberts,
Marshall County, State of Illinois."

(On margin:) This bond issued by the town of Roberts, on the 7th day of April, A. D. 1871, and duly recorded by me according to law.

JOSEPH MALEHAM,
Clerk of the Town of Roberts.

And thereby then and there acknowledged itself to be indebted to the said Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of $1,000, which sum the said defendants thereby then and there promised to pay to said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of said municipal bond, on, to wit, the 7th day of April, A. D. 1874, at the office of the treasurer of the county of Marshall, in the town of Lacon, in said State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, 1871, at the rate of ten per centum per annum, payable annually at the office of said treasurer, on the 7th day of April in each year, on the presentation and surrender of the coupons thereto annexed, as they severally became due, and to which bond were also annexed certain promissory notes, commonly called coupons or interest-warrants, subscribed by said supervisor and

town clerk, providing for the annual interest secured by said bond, and which have been heretofore detached from said bond. And whereas also, after the delivery of said bond, and the said coupons thereto annexed, to the said railroad company, to wit, on said 7th day of April, 1871, at the county of Suffolk, to wit, at the said State of Massachusetts, said railroad company sold, assigned, and
22 delivered said bonds and coupons, for value, to bona fide purchasers, by means whereof the said bonds so falling due as aforesaid on said 7th day of April, 1874, then and there came into the hands of said plaintiffs as the owners, bearers, and holders thereof, in good faith and for value, prior to said last-named day, and said plaintiffs then and there became and were and are the lawful bearers thereof, of which said defendant then and there had notice, by means whereof the said defendant, the town of Roberts, in consideration of the premises, then and there, to wit, on the said 7th day of April, 1871, at, to wit, the said town in the said district, promised to pay to said plaintiffs, as the lawful bearers of said bond, the said sum of money therein mentioned, at the time and place in the same mentioned, and according to the intent and meaning thereof, which time of payment has long since elapsed, yet the said defendant, though often requested, and though the said bond was duly presented for payment at the office of said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said bond became then and there payable as aforesaid, of all which said defendant then and there had notice, have not paid said sum of money in said municipal bond mentioned, nor any part thereof, but to pay the same has refused, and still neglects and refuses so to do.

5th count. And whereas also, heretofore, to wit, on the 7th day of April, A. D. 1871, at said town of Roberts, in the district aforesaid, the said town of Roberts, under and by virtue of the power conferred by "An act of the general assembly of the State of Illinois incorporating the Hamilton, Lacon and Eastern Rail-
23 road Company," and the laws of said state, to wit, "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company," in force March 7, 1867; "An act to authorize the incorporated towns and townships in the counties of Livingston, La Salle, and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," in force March 5, 1869, and "An act to authorize the counties of Woodford, La Salle, and Livingston, and the townships, cities, incorporated towns and corporations in said counties to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois," in force March 6, 1867, and by an election held in said town, to wit, on March 25th, 1869, issued and delivered to the said Hamilton, Lacon and Eastern Railroad Company, a railroad corporation under and existing by virtue of the act of the general assembly of said state first above recited, its certain other writ-

ten evidence of indebtedness, commonly called a municipal bond, and subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, in the words and figures following, to wit:

No. 5. $1,000.

United States of America, county of Marshall,
State of Illinois, town of Roberts.

Know all men by these presents, that the town of Roberts, in the county of Marshall and State of Illinois, is indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said town of Roberts promises to pay to the said the Hamilton, Lacon and Eastern Railroad Company, or to the bearer hereof, on
24 the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall aforesaid, in the town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the 7th day of April, A. D. 1871, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series, amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbering from 1 to thirty inclusive, each of which is for one thousand dollars, and all of which are of even date and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town on the 25th day of March, A. D. 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general assembly of the State of Illinois incorporating said railroad company.

In witness whereof, the supervisor of said town of Roberts has signed this bond, and the clerk of said town has attested the same, on this 7th day of April, in the year one thousand eight hundred and seventy-one.

JOHN NORTON,
Supervisor of the Town of Roberts,
Marshall County, State of Illinois.

25 Attest—JOSEPH MALEHAM,
Clerk of the Town of Roberts,
Marshall County, State of Illinois."

(On margin:) This bond issued by the town of Roberts, on the 7th day of April, A. D. 1871, and duly recorded by me according to law.

JOSEPH MALEHAM,
Clerk of the Town of Roberts.

And thereby then and there acknowledged itself to be indebted to the said Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, which sum the said defendant thereby then and there promised to pay to said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of said municipal bond, on, to wit, the 7th day of April, A. D. 1874, at the office of the treasurer of the county of Marshall, in the town of Lacon, in said State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, 1871, at the rate of ten per centum per annum, payable annually at the office of said treasurer on the 7th day of April in each year, on the presentation and surrender of the coupons thereto annexed as they severally became due, and to which bond were also annexed certain promissory notes, commonly called coupons or interest-warrants, subscribed by said supervisor and town clerk, providing for the annual interest secured by said bond, and which have been heretofore detached from said bond: and whereas also, after the delivery of said bond and the said coupons thereto annexed to the said railroad company, to wit, on said 7th day of April, 1871, at the county of Suffolk, to wit, at the said State of Massachusetts, said railroad company sold, assigned, and delivered said bonds and coupons for value to bona fide purchasers, by means whereof the said bonds so falling due as aforesaid on said 7th day of April, 1874, then and there came into hands of said plaintiffs as the owners, bearers, and holders thereof, in good faith
26 and for value, prior to said last-named day, and said plaintiffs then and there became and were and are the lawful bearers thereof, of which said defendant then and there had notice, by means whereof the said defendant, the town of Roberts, in consideration of the premises, then and there, to wit, on the said 7th day of April, 1871, at, to wit, the said town in the said district, promised to pay to the said plaintiffs, as the lawful bearers of said bond, the said sum of money therein mentioned, at the time and place in the same mentioned, and according to the intent and meaning thereof, which time of payment has long since elapsed, yet the said defendant, though often requested, and though the said bond was duly presented for payment at the office of said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said bond became then and there payable as aforesaid, of all which said defendant then and there had notice, have not paid said sum of money in said municipal bond mentioned, nor any part thereof, but to pay the same has refused and still neglects and refuses so to do.

6th count. And whereas also, heretofore, to wit, on the 7th day of April, A. D. 1871, at said town of Roberts, in the district aforesaid, the said town of Roberts, under and by virtue of the power conferred by "An act of the general assembly of the State of Illinois, incorporating the Hamilton, Lacon and Eastern Rail-

road Company," and the laws of said state, to wit, "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company," in force March 7, 1867; "An act to authorize the incorporated towns and townships in the counties of Livingston, LaSalle,
27 and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," in force March 5, 1869; and "An act to authorize the counties of Woodford, La Salle, and Livingston, and the townships, cities, incorporated towns and corporations in said counties to subscribe to the capital stock of any railroad company that now is, or hereafter may be, incorporated in the State of Illinois," in force March 6, 1867; and by an election held in said town, to wit, on March 25th, 1869, issued and delivered to the said Hamilton, Lacon and Eastern Railroad Company, a railroad corporation under and existing by virtue of the act of the general assembly of said state first above recited, its certain other written evidence of indebtedness, commonly called a municipal bond, subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, in the words and figures following, to wit:

No. 6. $1,000.

United States of America, county of Marshall,
State of Illinois, town of Roberts.

Know all men by these presents, that the town of Roberts, in the county of Marshall and State of Illinois, is indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said town of Roberts promises to pay to the said the Hamilton, Lacon and Eastern Railroad Company, or to the bearer hereof, on the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall aforesaid, in the town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the 7th day of April, A. D. 1871, at the rate of ten per centum per annum, payable annually
28 at the office of the treasurer of the county of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series, amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for one thousand dollars, and all of which are of even date, and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town on the 25th day of

March, A. D. 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general assembly of the State of Illinois incorporating said railroad company.

In witness whereof, the supervisor of said town of Roberts has signed this bond, and the clerk of said town has attested the same, on this 7th day of April, in the year one thousand eight hundred and seventy-one.

JOHN NORTON,
Supervisor of the Town of Roberts,
Marshall County, State of Illinois.

Attest—JOSEPH MALEHAM,
Clerk of the Town of Roberts.
Marshall County, State of Illinois.

(On margin:) This bond issued by the town of Roberts, on the 7th day of April, A. D. 1871, and duly recorded by me according to law.

JOSEPH MALEHAM,
Clerk of the Town of Roberts.

And thereby then and there acknowledged itself to be in-
29 debted to the said Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars, which sum the said defendant thereby then and there promised to pay to said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of said municipal bond, on, to wit, the 7th day of April, A. D. 1874, at the office of the treasurer of the county of Marshall, in the town of Lacon, in said State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, 1871, at the rate of ten per centum per annum, payable annually at the office of said treasurer, on the 7th day of April in each year, on the presentation and surrender of the coupons thereto annexed as they severally became due; and to which bond were also annexed certain promissory notes, commonly called coupons or interest warrants, subscribed by said supervisor and town clerk, providing for the annual interest secured by said bond, and which have been heretofore detached from said bond: and whereas also, after the delivery of said bond and the said coupons thereto annexed to the said railroad company, to wit, on said 7th day of April, 1871, at the county of Suffolk, to wit, at said State of Massachusetts, said railroad company sold, assigned, and delivered said bonds and coupons for value to bona-fide purchasers, by means whereof the said bonds so falling due as aforesaid on said 7th day of April, 1874, then and there came into the hands of said plaintiffs as the owners, bearers, and holders thereof in good faith and for value, prior to said last-named day, and said plaintiffs then and there became and were and are the lawful bearers thereof, of which said defendant then and there had
30 notice, by means whereof the said defendant, the town of Roberts, in consideration of the premises, then and there, to wit, on the said 7th day of April, 1871, at, to wit, the said town in the said district, promised to pay to the said plaintiffs as the lawful

bearers of said bond the said sum of money therein mentioned, at the time and place in the same mentioned, and according to the intent and meaning thereof, which time of payment has long since elapsed; yet the said defendant, though often requested, and though the said bond was duly presented for payment at the office of said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said bond became then and there payable as aforesaid, of all which said defendant then and there had notice, have not paid said sum of money in said municipal bond mentioned, nor any part thereof, but to pay the same has refused and still neglects and refuses so to do.

7th count. And whereas also, heretofore, to wit, on the 7th day of April, A. D. 1871, to wit, at said town of Roberts, in the district aforesaid, the said town of Roberts, in the county of Marshall and State of Illinois, under and by virtue of the power conferred by an act of the general assembly of the said State of Illinois, entitled "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company," approved March 7, 1867, and of an election held in said town on, to wit, the 25th day of March, A. D. 1869, issued and delivered to the Hamilton, Lacon and Eastern Railroad Company, a railroad corporation created and existing by virtue of said act of the general assembly of said state, its written
31 evidences of indebtedness, commonly called municipal bonds, subscribed by John Norton, the supervisor, and Joseph Maleham, the town clerk of said town, to the number of thirty, and thereby then and there in and by each of said evidences of indebtedness or bonds acknowledged itself to be indebted to the Hamilton, Lacon and Eastern Railroad Company, or bearer, in the sum of one thousand dollars ($1,000), which sum the said town of Roberts promised to pay to the said Hamilton, Lacon and Eastern Railroad Company, or to the bearer of such bond, on the 7th day of April, in the year one thousand eight hundred and seventy-four, at the office of the treasurer of the county of Marshall in the State of Illinois, on the presentation of said bond, with interest thereon from the 7th day of April, A. D. 1871, at the rate of ten per cent. per annum, payable annually, at the office of the treasurer of Marshall county aforesaid, on the presentation and surrender of the coupons to said bonds annexed; and in each of which bonds it was recited that such bond was one of a series, amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from 1 to 30 inclusive, each of which is for one thousand dollars, and all of which are of even date and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of the majority of the voters of said town in favor thereof, at a

special election held for such purpose in said town on the 25th day of March, A. D., 1869, in pursuance of the provisions of the
32 laws of the State of Illinois, and of the several acts of the general assembly of the State of Illinois incorporating said railroad company," and to each of said bonds was annexed at the said time of said issuing and delivery, a certain promissory note in writing, commonly called a coupon or interest-warrant, subscribed by said supervisor by the name of John Norton, supervisor, and by said town clerk by the name of Joseph Maleham, town clerk, in and by which interest-warrant the said town of Roberts promised to pay to the bearer thereof, on the 7th day of April, A. D. 1874, the sum of one hundred dollars, at the office of the treasurer of Marshall aforesaid, the said sum of $100 *dollars*, being the annual interest due on each of said bonds for the year ending April 7th, 1874, each of said coupons being numbered and corresponding in number to the number of the bond to which the same was annexed as aforesaid; and whereas also, after the delivery of said bonds with the said coupons annexed to said railroad company, to wit, on said 7th day of April, A. D. 1871, at the county of Suffolk, to wit, at the said State of Massachusetts, said railroad company sold, assigned, and delivered said bond and coupons for value and to bona fide purchasers, by means whereof the said coupons to the number of twenty-two so falling due as aforesaid on said 7th day of April, A. D. 1874, then and there became and were detached from said bonds, and came into the hands of said plaintiffs as the owners, bearers, and holders thereof, in good faith and for value, prior to said last-named day, and the plaintiffs then and there became and were and are the lawful bearers thereof; and whereas one of said twenty-two coupons or interest-war-
33 rants, so as aforesaid detached, was and is in the words and figures following, to wit:

"Town of Roberts, county of Marshall, State of Illinois, will pay the bearer one hundred dollars, at the office of the county treasurer in the town of Lacon, on the 7th day of April, A. D. 1874, interest on bond No. 8, issued by said town in payment of subscription to the capital stock of the Hamilton, Lacon and Eastern Railroad Company.

JOHN NORTON,
Supervisor of Town of Roberts.

JOSEPH MALEHAM,
Clerk of the Town of Roberts."

And whereas each of the other of said coupons last named, saving that it bore a serial number corresponding to the number of the bond from which it was detached as aforesaid, was of the same tenor, effect, and amount with the one of said coupons above set forth, said twenty-two coupons being numbered respectively Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,

28, 29, the said defendant, the town of Roberts aforesaid, in consideration of the premises, then and there, to wit, on the said 7th day of April, A. D. 1871, at, to wit, said town of Roberts, in said district, promised to pay to the said plaintiffs as the lawful bearers of said twenty-two coupons or interest-warrants each and all of said sums of money in said coupons mentioned, at the time and place in the same mentioned, and according to the intent and meaning thereof,

which time has long since elapsed, yet the said defendant,
34 though often requested, and though each of said interest-warrants was duly presented for payment at the office of the said treasurer of Marshall county, to wit, at said town of Lacon, on the day, to wit, when the said coupons became due and payable as aforesaid, of all which said defendant then and there had notice, have not paid said sums of money in said twenty-two coupons mentioned, nor any part thereof, but to pay the same has refused and still neglects and refuses so to do. And the plaintiffs aver that the said twenty-two coupons sued on in this court were and are the coupons mentioned in the inducement to this court as having been annexed to the aforesaid bonds, and that since said railroad company has sold and delivered the said bonds as aforesaid, said bonds have passed from hand to hand in the stock-market like other negotiable securities, and that the plaintiffs cannot produce the said bonds to the court. And plaintiffs further aver that they are the owners of the interest accrued on said bonds, as evidenced by the said coupons, and they hereby bring said coupons into court and offer to have the same canceled upon entry of judgment thereon in this cause.

And whereas, also, the said defendants heretofore, to wit, on the 1st day of September, A. D. 1874, at Roberts, to wit, at said district, became and was indebted to said plaintiffs in the sum of fifteen thousand dollars for money before that time lent by said plaintiffs to said defendants at said defendants' request; and in a like sum for money then and there due from defendant to plaintiffs for interest on the coupons in the first count of this declaration
35 mentioned, accruing after their maturity as aforesaid; and in a like sum for money then and there found to be due and owing from said defendant to said plaintiffs on an account then and there stated between them.

And whereas, also, the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, in consideration of the premises, promised to pay said several sums of money to the plaintiffs on request, yet said defendant has disregarded its said promises and have not paid said sums of money, nor any of them, nor any part thereof, to said plaintiffs, though often requested so to do, to the damage of said plaintiffs of fifteen thousand dollars, and therefore they bring suit by—

PADDOCK & IDE, *their Attys.*

36 *Copy of Instruments and Accounts sued on.*

One of the nineteen coupons sued on in this action is set out in the 7th count. The other twenty-two coupons are like it in all respects excepting as to the numbers of the bonds from which the same were detached. The coupons are numbered as follows: Bond Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29.

Defendant to plaintiffs	Dr.
September 1, 1874.—To money lent.....	$15,000
To money paid	15,000
To int. due on coupons.....	15,000
To money due on act. stated.....	15,000

The said defendant, the town of Roberts, is hereby notified that the only cause of action relied on is the bonds and coupons sued upon as aforesaid, and that the same will be offered under both special and common counts of Nar. if necessary.

PADDOCK & IDE, *Plffs.' Attys.*

37 United States of America, Northern District of Illinois, Circuit Court, Oct. 7, 1874.

MATTHEW BOLLES, M. SHEPARD BOLLES, PARTNERS in business under the firm of M. Bolles & Co., *vs.* TOWN OF ROBERTS. } Assumpsit.

George Ide, being duly sworn, says he is the agent and attorney of the plaintiffs in the above-entitled cause; that the plaintiffs' demand therein is the bonds and coupons counted on in the several counts in the foregoing declaration; that there is now due to said plaintiffs on said bonds and coupons from the defendant on the principal the sum of eighty-two hundred dollars, and of interest to this date the sum of $339.12, making all now due to plaintiffs $8,539.12, after allowing defendant all its just claims, deductions, and set-offs, of which there are none; and further, that said town is in said district.

GEO. O. IDE.

Subscribed and sworn to before me, Sept. 25, 1874.

E. A. DRUMMOND, *U. S. Com.*

(Endorsed:) Filed Sept. 25, 1874. Wm. H. Bradley, clk.

38 Afterwards, to wit, on the 21st day of December, A. D. 1874, said defendant, by its attorney, filed in said clerk's office its demurrer to the declaration in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer to Declaration.

United States Circuit Court, Northern Dist. of Illinois. December Term, A. D. 1874.

MATTHEW BOLLES ET AL. } Assumpsit.
v.
TOWN OF ROBERTS. }

And the defendant comes and defends the wrong and injury when, &c., and says the plaintiffs' declaration and each count thereof are insufficient in the law to entitle them to maintain said action; all which the defendant is ready to verify; prays judgment, &c.

By T. M. SHAW, *its Atty.*

(Endorsed:) Filed Dec. 21, 1874. Wm. H. Bradley, clk.

Afterwards, to wit, on the 13th day of January, A. D. 1875, in the December term, A. D. 1874, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

39 MATTHEW BOLLES ET AL. } Assumpsit.
v.
TOWN OF ROBERTS. }

Now come the plaintiffs, by their attorney, and call up the demurrer of the defendant to the declaration herein, and the court being now fully advised thereon overrules the same, and on motion of the plaintiffs' attorney the defendant is hereby ruled to plead to said declaration in ten days.

40 Afterwards, to wit, on the 17th day of February, A. D. 1875, said defendant, by its attorney, filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

United States Circuit Court, Northern District Illinois. December Term, A. D. 1874.

MATTHEW BOLLES ET AL. } Assumpsit.
vs.
TOWN OF ROBERTS. }

1. And the defendant comes and defends the wrong and injury, when, &c., and as to the first, second, third, fourth, fifth, and sixth counts of the plaintiffs' declaration says *actio non*, as to said counts, because it says that the said bonds in each of the said counts mentioned and each of them are payable to the Hamilton, Lacon and Eastern Railroad Company, or bearer, and by the laws of the State of Illinois in force at the time of the alleged making of said bonds, and at the time of the alleged sale and assignment of the same by

the said railroad co., as set forth in the declaration, were transferable so as to vest the legal title thereto and the right to sue thereon only by indorsement in writing upon the said bonds by the payee thereof, the said bonds not having been sold or transferred on nor since the first day of July, A. D. 1874, and the defendant
41 avers that the said payee did not indorse the said bonds in writing nor any nor either of them, and plaintiff was not at the time of the commencement of this suit the legal holder of said bonds by the written indorsement of the payee thereof, or of either of them, and of this defendant puts itself upon the country, &c.

2d plea. And for a further plea in this behalf to the first, second, third, fourth, fifth, and sixth counts in said narr. defendant says *actio non*, as to said counts, because it says that at the time of the commencement of said suit, plaintiff was not the legal holder of the said bonds named in said counts, nor any nor either of them, and of this defendant puts itself on the country, &c.

3d plea. And for a further plea in this behalf to the first, second, third, fourth, fifth, sixth, and seventh counts defendant says *actio non*, as to said counts, because he says that the said election set forth and recited in the said bonds was held contrary to and in violation of law in this, that the same was called by the town clerk of said town without any application being filed therefor, as required by the said act, in force March 5, 1869, entitled "An act to authorize the incorporated towns and townships in the counties of Livingston, La Salle, and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company," but the same was called by said town clerk under, by virtue, and in pursuance of a certain application in writing filed in his office on the 18th day of February, A. D. 1869. Which application in
42 writing was in letters and figures following, to wit: "To the the township clerk of the town of Roberts, county of Marshall and State of Illinois. We, the undersigned, C. Broaddus, Hiram Myers, justice of the peace and supervisor, and twelve freeholders of the said township, deeming it necessary that a special town meeting be held in said township for the purpose of allowing the legal voters of said township to vote on the question as to whether or not said township shall subscribe thirty thousand dollars to the capital stock of the Hamilton, Lacon and Eastern Railroad Company, and issue the bonds of said township therefor, payable one-third in three years, one-third in five years, and one-third in eight years from their date, with ten per cent. interest thereon per annum, payable annually, for the purpose of building a railroad from the city of Lacon, on the old grade of the American railroad, to connect with the Chicago, Alton and St. Louis railroad, in said state, to be signed by the supervisor and countersigned by the clerk of said township, as follows, to wit, when the track of said Hamilton, Lacon and Eastern railroad shall have been graded, ties laid

and the iron thereon, and the said railroad completed, and the cars running in said town of Roberts, together with a side track and depot building within one-half or three-fourths of one mile of the geographical centre of said town of Roberts, on the line of said railroad, then the sum of thirty thousand dollars, or so much of said sum as may be necessary for the completion of said railroad, shall be issued as aforesaid.

We, therefore, ask you to call a meeting of said township for the purpose of voting upon the question of subscribing said stock, as soon as you conveniently can so do.

43 Names—James Hoyt, Jacob Salters, H. Malone, John Norton, Abraham Delory, Joseph Malone, D. H. Maleham, James B. Davis, G. W. Walker, William B. Green, J. R. Show, Livingstone Roberts, J. J. Myers.

And defendant in fact saith that said application remaining on file in the office of the said town clerk, he on the 15th day of March, A. D. 1869, called said election in pretended pursuance of said application, and on said day posted written notices of such election in three of the most public places in said town, which notices so posted were in letters and words following, to wit:

Special Town Meeting.

Whereas, the supervisor and justice of the peace, together with twelve freeholders of the town of Roberts, have, in writing, filed in my office a statement that a special town meeting is necessary to the interest of said town, setting forth the object of the meeting.

The inhabitants, legal voters of the said town of Roberts, are, therefore, hereby notified that a special town meeting will be held at the Town Hall, on Thursday, the 25th day of March, 1869, the polls will be opened at nine o'clock in the forenoon and close at 6 P. M., for the purpose of allowing the legal voters of said town to vote upon the question as to whether or not said township shall subscribe thirty thousand dollars to the capital stock of the Hamilton, Lacon and Eastern Railroad Company, and issue the bonds of said township therefor, payable one-third in three years, one-third in five years, and one-third in eight years from their dates, with ten per cent. interest thereon per annum, payable annually, for the purpose of building a railroad from the city of Lacon, on the

44 old grade of the American Central railroad, through said town of Roberts, to connect with the Chicago, Alton and St. Louis railroad, in said state, said bonds to be signed by the supervisor and countersigned by the clerk of said town as follows, to wit:

When the track of said Hamilton, Lacon and Eastern railroad shall have been graded, ties laid and the iron thereon, and the said railroad completed and the cars running in said town of Roberts, together with side track and depot built within one-half or three-fourths of one mile of the geographical centre of said town of

Roberts, on the line of said railroad, then the sum of thirty thousand dollars, or so much of said sum as may be necessary for the completion of said railroad, of said bonds shall be issued as aforesaid, being the object contained in said statement filed in my office this 18th day of February, 1869.

Given under my hand and seal, at Roberts, this 15th day of March, 1869.

H. STATETER, *Town Clerk.*

And said election mentioned in plaintiffs' declaration was held in pursuance of said application and notice, and by virtue of no other authority, application, or notice whatever. Wherefore the defendant saith that the said election so held was called without authority of law and was unlawful and void, and the notice thereof given was not for the length of time required by said law, being only ten days' notice, nor was the said election called or held in pursuance or pretended pursuance of said act, nor did a majority of the legal voters then residing in said town and lawfully entitled to vote at said election, vote in favor of said subscription, and the corporate
45 authorities of said town never in any manner assented to the incurring of said indebtedness, and said election conferred no authority upon the supervisor and town clerk of said town, nor upon either of them, to make the subscription of stock mentioned in the said declaration, nor to issue the bonds and coupons in payment thereof in manner and form as in the said declaration is stated.

Wherefore the defendant in fact saith the same bonds and coupons were made and issued by the supervisor and town clerk of said town without authority of law and without the assent of the corporate authorities of said town, and are void.

And defendant further, in fact, saith that the said application and notice hath ever since the said election remained of record in the town clerk's office of said town, among the public records of said town, together with a written protest against the legality thereof, signed by a majority of the legal voters of said town, and said election notice was also attached to and formed a part of the written contract of subscription made by the supervisor of said town on the subscription-book of the said railroad company, of all of which the plaintiff, prior to his alleged purchase of said bonds, had constructive notice, to wit, on the 7th day of April, 1871, at, &c.

All of which defendant is ready to verify; wherefore it prays judgment, &c.

4 plea. And for a further plea in this behalf to the first, second, third, fourth, fifth, sixth, and seventh counts of said declaration, the defendant as to said counts says *actio non*, because it says that at the election mentioned in said counts it was voted as
46 specified in the notice thereof to subscribe the said stock to

the said railroad company for the purpose of building a railroad from the city of Salem, on the old grade of the American Central railroad, through said town of Roberts, to connect with the Chicago and Alton railroad, in said state; said railroad being described in said notice as the Chicago, Alton and St. Louis railroad. Said bonds to be issued when the track of the Hamilton, Lacon and Eastern Railroad Company shall have been graded, ties laid and the iron thereon, and the railroad completed and the cars running in said town, together with side track and depot built within one-half or three-fourths of a mile of the centre of said town, on the line of said railroad, then the bonds, or so much thereof as may be necessary to be issued, the said purpose and condition being stated in the notice of said election.

And defendant in fact saith that afterwards, to wit, on the 31st day of March, A. D. 1869, and by virtue of said election and by no other authority, the supervisor of said town, upon the books of the Hamilton, Lacon and Eastern Railroad Company, subscribed for three hundred shares of one hundred dollars each of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, to aid in the construction of the said railroad from Lacon eastward to the Illinois Central railroad.

And defendant in fact saith that the said supervisor in making said subscription did not pursue the authority vested in him by said election, even if said election had been legal, and the said subscription was not in fact made, &c., or used in building the Hamilton,
47 Lacon and Eastern railroad from the city of Lacon on the grade of the American Central railroad, through said town, to connect with the Chicago, Alton and St. Louis Railroad Company, but on the contrary, said subscription was made to aid in the construction of the said Hamilton, Lacon and Eastern railroad from Lacon eastward to the Illinois Central railroad, and the said subscription was in fact used in building a railroad east from Lacon sixteen miles to connect with the Chicago, Jacksonville and St. Louis Railroad Company, which said sixteen miles of road was the road and property of the Chicago and Alton Railroad Company, and not of the Hamilton, Lacon and Eastern Railroad Company, and defendant in fact saith that no part of the railroad of the Hamilton, Lacon and Eastern railroad east from Lacon to the Chicago and Alton railroad was in fact ever built; and defendant in fact saith said subscription as made and the enterprise in which the same was expended were each a different enterprise substantially and fundamentally from the enterprise voted for, as specified in said election notice, and not *or* beneficial to defendant.

Wherefore defendant in fact saith said subscription and the issuance of said bonds in payment thereof were without authority of law and void, and the said bonds and coupons are null and void.

All of which the defendant is ready to verify; wherefore it prays judgment as to said counts.

5th plea. And for a plea in this behalf to the remaining
48 counts in the plaintiffs' declaration, being the common counts, the defendant defends the wrong and injury, when, &c., and says it did not undertake or promise in manner and form as the plaintiffs have in said count complained against it, and of this it puts itself upon the country.

By T. M. SHAW, *Attorney for Deft.*

(Endorsed:) Filed Feby. 17, 1875. Wm. H. Bradley, clk.

And on the same day, to wit, the 17th day of February, A. D. 1875, said plaintiffs, by their attorneys, filed in said clerk's office their joinder of issue and demurrer to the pleas of said defendant in said entitled cause, which said joinder and demurrer is in the words and figures following, to wit:

Joinder of Issue and Demurrer to Pleas.

United States Circuit Court, Northern District of Illinois. December Term, 1874.

M. BOLLES AND CO. } Assumpsit.
vs.
TOWN OF ROBERTS. }

And said plffs., by their attorneys, Paddock and Ide, come and say, as to the second and fifth pleas of said defendant, wherein the defendant puts itself upon the country, that they, the plaintiffs, do the like.

49 PADDOCK AND IDE, *Plffs.' Attys.*

And as to said defendant's first, third, and fourth pleas the plaintiffs come and defend the wrong and injury, when, &c., and say that each of said pleas is insufficient in law for them to answer unto, and this they are ready to verify, wherefore they pray judgment, &c.

By PADDOCK AND IDE, *their Attorneys.*

(Endorsed:) Filed Feby. 17, 1875. Wm. H. Bradley, clk.

Afterwards, to wit, on the 14th day of May, A. D. 1875, said parties, by their attorneys, filed in said clerk's office their stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States Circuit Court, Northern District of Illinois, May term, 1875.

M. BOLLES AND CO. }
vs.
TOWN OF ROBERTS. }

The said plaintiffs and defendants hereby waive a trial by jury, and submit the issues joined to the court.

MAY 14, 1875. PADDOCK AND IDE, *for Plffs.*
T. M. SHAW, *Atty. for Defts.*

50 (Endorsed:) Filed May 14, 1875. Wm. H. Bradley, clk.

On the same day, to wit, the 14th day of May, A. D. 1875, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

MATTHEW BOLLES AND M. SHEPARD BOLLES
vs.
TOWN OF ROBERTS. } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the demurrer of the plaintiffs to the first, third, and fourth pleas of the defendant herein, and after hearing the arguments of counsel the court sustains said demurrer, and upon issue joined upon the second and fifth pleas herein by agreement of the parties, by their attorneys as per stipulation filed, they waived the intervention of a jury, and for trial put themselves upon the court, and after hearing the evidence, the court being fully advised in the premises, finds the issue for the plaintiffs, and assesses their damages to the sum of nine thousand and ten dollars and ninety-nine cents. It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant the said sum of nine thousand and ten dollars and ninety-nine cents, their damages so as aforesaid assessed, together with their costs and charges in this behalf
51 expended, amounting to the sum of sixty-six dollars and forty-five cents.

And on the same day, to wit, the 14th day of May, A. D. 1875, on the hearing of said cause, the following exceptions were taken and allowed by the court, and made of record in said entitled cause, in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

Circuit Court, May term, A. D. 1875.

MATTHEW BOLLES AND M. SHEPARD BOLLES, PARTNERS, &C.,
vs.
TOWN OF ROBERTS. }

Be it remembered, that on the trial of the issues joined in this cause before the court, a jury being waived by written stipulation filed by the parties, the plaintiffs to maintain the issues on their part offered and read in evidence six municipal bonds, copies of which respectively are found in the first, second, third, fourth, fifth, and sixth counts of the declaration, also 22 coupons of the description mentioned in the seventh count of the declaration.

The plaintiffs proved by their own deposition that they purchased said bonds and coupons in the market at Boston, Massachusetts, in good faith, and paid value therefor, in the month of January, 1872, at the rate of 93½ cents on the dollar, and that the same were

52 then delivered to them without any notice to the plaintiffs of any defence thereto.

The defendant objected to the admission in evidence of each of said six bonds, at the time the same were offered, because the same were not endorsed in writing by the payee, the Hamilton, Lacon and Eastern Railroad Company, claiming that plaintiffs could not become the legal holders thereof, the same being domestic paper, without such endorsement in writing on the said bonds according to the laws of Illinois and the decisions of the courts of Illinois; but the court overruled said objection and admitted each and every of said bonds in evidence, to which decision of the court in overruling such objection and admitting said bonds and coupons, and each of them, in evidence without the written endorsement of the payee thereon, the defendant then and there in apt time excepted.

The above was all the evidence in the case.

At the request of the defendant the findings of the court were special as to the six bonds in controversy, as follows:

First. That said bonds were made and delivered to the Hamilton, Lacon and Eastern Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, at the time, in the manner, and for the purpose as set forth and alleged in the declaration, and that the plaintiffs purchased the same in the market in the month of January, A. D. 1872,

53 and paid value therefor at the rate of 93½ cents on the dollar, in good faith and without any notice of any defence thereto, and the same were then delivered to them.

Second. That none of said bonds were ever endorsed in writing by the Hamilton, Lacon and Eastern Railroad Company, the payee thereof, but all of them were made payable to said company, or to the bearer thereof, by their terms as set out in the special counts of the declaration.

Upon these findings the defendant asked the court to hold and rule that the right of action on said bonds was still in the original payee, and that the plaintiffs were not the legal holders thereof, and that as to the bonds, judgment should be rendered in favor of the defendant.

The court refused to so hold and rule, but held and ruled that the plaintiffs became the legal holders of said bonds by the sale and delivery thereof to them without any written endorsement thereon, and rendered judgment for the plaintiffs in the sum of nine thousand and ten dollars and ninety-nine cents. Said judgment including the amount of said bonds and coupons and interest from maturity. To which decisions, rulings, and judgment of the court upon said findings the defendant then and there in apt time objected and excepted.

And inasmuch as the said matters do not otherwise appear of record the defendant then and there prayed the court to sign and

seal this, its bill of exceptions in said cause, and make the same a part of the record therein. And it was then and there
54 done accordingly in apt time and this bill of exceptions made part of the record in said cause.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed May 14th, 1875. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 20th day of April, A. D. 1877, said defendant filed in said clerk's office its bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

In the Supreme Court of the United States of America.

THE TOWN OF ROBERTS
vs.
MATTHEW BOLLES AND M. SHEPHARD BOLLES.

Know all men by these presents, that we, the Town of Roberts, as principal, and Hiram Myers and J. J. Myers, as sureties, are held and firmly bound unto the above-named Matthew Bolles and M. Shephard Bolles in the sum of five hundred dollars, to be paid unto the said Matthew Bolles and M. Shephard Bolles, their executors and administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, and administrators, firmly by these presents.
55 Sealed with our seals, and dated this 12th day of April, A. D. 1877.

Whereas the above bounden Town of Roberts has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the Circuit Court of the United States for the Northern District of Illinois, in a suit wherein the said Matthew Bolles and the said M. Shephard Bolles were plaintiffs and the said Town of Roberts was defendant.

Now, therefore, the consideration of this obligation is such that if the above-named Town of Roberts shall prosecute its said writ of error to effect and answer all costs if it fail to make good its plea, then this obligation shall be null and void; otherwise the same shall remain in full force and effect.

THE TOWN OF ROBERTS,
By JOHN MYERS, [SEAL.]
Supervisor of said Town.
HIRAM MYERS. [SEAL.]
J. J. MYERS. [SEAL.]

(Endorsed:) This bond is approved by me but is not to operate as a supersedeas. H. W. Blodgett, judge. Filed April 20, 1877. Wm. H. Bradley, clerk.

56 NORTHERN DISTRICT OF ILLINOIS, *ss.*

I, William H. Bradley, clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Matthew Bolles and M. Shepard Bolles are the plaintiffs and the Town of Roberts is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 23d day of April, A. D. 1877, and of our independence the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

57 UNITED STATES OF AMERICA, *sct.*

To Matthew Bolles and M. Shephard Bolles, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, wherein the town of Roberts is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Henry W. Blodgett, district judge for the northern district of Ills., and presiding at present in the circuit court of said dist., this sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

H. W. BLODGETT, *Judge.*

Received a copy of the foregoing, this 16th day of April, 1877.

PADDOCK & IDE,
Attorneys of Record for the said Matthew Bolles and M. Shephard Bolles.

(Endorsed:) United States Supreme Court. In error. The Town of Roberts v. Matthew Bolles and M. Shephard Bolles. Citation. Andrew J. Bell, atty. for plff.

58 UNITED STATES OF AMERICA, NORTHERN DISTRICT OF ILLINOIS, } *ss.*

The United States of America to the Judges of the Circuit Court of the United States for the Northern District of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court,

between Matthew Bolles and M. Shepard Bolles, plaintiffs, and the town of Roberts, defendant, a manifest error hath happened, to the great damage of the said town of Roberts, as by its complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1877, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 10th day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Supreme Court of the United States. Matthew Bolles et al. vs. Town of Roberts. Writ of error.

59 In the Supreme Court of the United States, of the October Term, A. D. 1877.

THE TOWN OF ROBERTS
vs.
M. SHEPHARD BOLLES AND MATTHEW BOLLES, DOING BUSINESS under the firm-name of M. Bolles & Co.,
vs.
THE TOWN OF ROBERTS. } In error.

Afterwards, to wit, on the first Monday of October in said term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said town of Roberts, by A. J. Bell, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court below erred in sustaining the demurrer of defendant in error to pleas Nos. one, three, and four, filed by plaintiff in error in court below, and court erred in not overruling said demurrer.

Second. The court erred in admitting in evidence, at the time the same were offered, each of the six bonds referred to in bill of exceptions, against the objections of the plaintiff in error made at the time; because the said bonds were not endorsed in writing by the payee, the Hamilton, Lacon and Eastern Railroad Company,
as defendant in error could not become the legal holders
60 thereof, the same being domestic paper, without such en-

dorsement in writing, according to the laws of Illinois and the decisions of the courts of Illinois, and the court below erred in refusing to so hold and rule when requested so to do by plaintiff in error.

Third. The court erred in rendering judgment on said bonds in favor of defendant in error.

Fourth. The court erred in not rendering judgment on said bonds in favor of plaintiff in error.

Fifth. The court erred in rendering judgment in the case in favor of defendant in error.

And the said town of Roberts prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it be restored to all things which it has lost by occasion of the said judgment.

A. J. BELL,
Attorney for Plaintiff in Error.

(Endorsed:) M. Bolles & Co. vs. The Town of Roberts. Assignments of error.

(Endorsed on cover:) N. Illinois C. C. U. S. No. 378. The Town of Roberts, plaintiff in error, vs. Matthew Bolles and M. Shepard Bolles. Filed 1st June, 1877.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1878.

No. 378.

TOWN OF ROBERTS, PLAINTIFF IN ERROR

vs.

MATTHEW BOLLES AND M. SHEPARD BOLLES, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

A. J. BELL, PEORIA, ILLINOIS,
Attorney for Plaintiff in Error.

Filed ..... *, A. D.* .....

Clerk U. S. Court.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The great importance of the questions involved in this case, as well as the large amount of money directly and indirectly at stake, is my apology for presuming to trespass upon your valuable time with the lengthy argument appended to the brief in this case.

I feel very confident that the position taken in the following Brief and Argument, as to who are the legal owners of the bonds in this case; as to the invalidity of the bonds and coupons in question; and on the question of judicial comity between the State and Federal Courts, are in exact accord with the law of this *most honorable court*, as uniformly announced in their decisions on the subjects herein pertaining. And I hope the Court may have the time and patience to indulge all the points and suggestions hereinafter made with a careful perusal.

In the case of *Williams v. The Town of Roberts*, 88 Ill., 12, declaring the bonds in question in this case to be void, I have procured from the Supreme Court Re-Reporter, Hon. N. L. Freeman, a copy of advance sheets of said volume containing the report of said case, which I have caused to be filed in this case, together with a card from the Reporter, that the court may have the benefit of an authorized report of the same, preceded with a full statement of the case. The text of the opinion, without the statement of the case, is printed in full at the end of this argument.

A. J. BELL,
Attorney for Plaintiff in Error.

United States of America.

In the Supreme Court.

OCTOBER TERM A. D. 1878.

TOWN OF ROBERTS, *Plaintiff in Error*,

vs.

MATTHEW BOLLES and M. SHEPPARD BOLLES, Partners, Etc., *Defendants in Error*.

STATEMENT OF THE CASE.

This is a case brought by M. Bolles & Co., in the court below, in assumpit, on six municipal bonds, and a lot of coupons, against the Town of Roberts, defendant below. The bonds declared on read as follows:

$1,000. No. 5. United States of America, State of Illinois, County of Marshall, Town of Roberts. Know all men by these presents, that the Town of Roberts, in the County of Marshall, and State of Illinois, is indebted to the Hamilton, Lacon & Eastern Railroad Company, or bearer, in the sum of one thousand dollars lawful money of the United States, which the said town of Roberts promises to pay to the said Hamilton, Lacon and Eastern Railroad Company, or the bearer

hereof, on the 7th day of April, in the year one thousand eight hundred and seventy-six, at the office of the Treasurer of the County of Marshall, aforesaid, in the Town of Lacon, Illinois, on the presentation of this bond, with interest thereon from the 7th day of April, A. D., 1876, at the rate of ten per centum per annum, payable annually at the office of the Treasurer of the County of Marshall aforesaid, on the 7th day of April in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series, amounting in the aggregate to thirty thousand dollars, and consisting of thirty bonds, numbered from one to thirty inclusive, each of which is for one thousand dollars, and all of which are of even date, and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said Town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election held for such purpose in said town, on the 25th day of March, A. D., 1869, in pursuance of the laws of the State of Illinois, and the several acts of the General Assembly of the State of Illinois, incorporating said railroad company.

COPY OF COUPON.

Town of Roberts, County of Marshall, State of Illinois, will pay to the bearer one thousand dollars at the

office of the County Treasurer in the Town of Lacon, on the 7th day of April, 1876, interest on bond No. 11, issued by said town in payment of subscription to the capital stock of the Hamilton, Lacon and Eastern Railroad Company.

The above is a copy of each of the bonds and coupons sued on, [See pages printed record 3 to 19.] except the numbers. Said bonds and coupons were made a part of the declaration, and purport to be given by the Supervisor, and attested to by the Town Clerk.

The plaintiffs, below, declare that they are bona fide holders for value, without notice of any defense to the bonds, further than such notice as the law may charge, that they purchased the same in the market January, 1872. See pages printed record 3 to 19.

The defendant, below, interposed five pleas: 1st. That the plaintiffs had no title to the bonds for the reason that they were not assigned to them by endorsement in writing, but by mere delivery, and that said assignment was made before July 1st, 1874, and that by the laws of the State of Illinois, and the decisions of the Supreme Court of Illinois there on, such assignment, without endorsement in writing, did not transfer the legal title to plaintiffs below, and they are not, therefore, entitled to sue on said bonds in their own name. 2nd. Defendants pleaded, generally denying that plaintiff were the legal holders of said bonds. 3rd. That the election recited in said bonds was held contrary to and in violation of law, in this: that said

election was called by the Town Clerk without any application having been filed, as required by an act of the General Assembly of said State of Illinois, approved March 5th, 1869, entitled "an act to authorize the incorporated towns of La Salle, and Marshall, and Livingston counties to subscribe to the Hamilton, Lacon & Eastern Railroad Company." That the Town Clerk called said election by virtue of no other authority than an application for calling the same [See text of application in printed record p. 25.] filed in the Town Clerk's office on the 18th day of February, A. D. 1869, which application was signed by only twelve legal voters and taxpayers of said town. That on the 15th day of March, 1869, said application remaining on file, and from no other authority, the said Town Clerk called said election, in pretended pursuance of the said application, and on the said 15th day of March the clerk posted written notices of such election, to be held on the 25th day of March, A. D. 1869, which notices were dated on that day, and that said election was held in pursuance of said notice [See full text of same in printed record, page 24.] and application, and by virtue of no other authority whatever, the notice not being for the time required by said act, wherefore the said plea alleges that the said election, as held, was unlawful and void, called without authority, and conferred no power upon the supervisor and town clerk, of either of them, to make the subscription or stock mentioned in plaintiff's declaration, nor to issue the bonds and coupons in payment thereof, in manner and form as stated in said

declaration; and therefore said bonds and coupons are without authority of law and void, and that said application and notice has ever remained in said town clerk's office, among the records thereof, ever since the holding of said election, and the said election notice was also attached to and formed a part of the written contract of subscription made by the supervisor of said town on the subscription book of the said railroad company, all of which plaintiff had constructive notice prior to his alleged purchase of said bonds, to-wit: On the 7th day of April, 1871. The plea also alleges that not a majority of the legal voters of said town voted for said subscription, and also alleges that a portion of the voters present at said election, made a written protest against holding said election, because of the above illegalities.

Fourth plea alleges that at said election mentioned in said bond, it was voted, as specified in the notice thereof, to subscribe to the said stock of the said railroad company, for the purpose of building a railroad from the city of Lacon, on the old grade of the American Central railroad, through said town of Roberts, to connect with the Chicago and Alton railroad in said State, a distance of 50 miles, said railroad being named in said notice as the Chicago, Alton and St. Louis railroad, said bonds to be issued when the track of said Hamilton, Lacon and Eastern railroad shall have been graded, ties laid, and the iron thereon, and the said railroad completed, and the cars running in said town, together with side tracks and depot building, within

one-half or three-quarters of a mile from the geographical center, on the line of said American railroad, then the bonds, or so much thereof as may be necessary to be issued, the said purpose and condition being stated in said notice of election, that afterwards, to-wit: on the 31st day of March, A. D. 1869, and by no other authority than said election, the Supervisor of said town, upon the books of the Hamilton, Lacon and Eastern Railroad Company subscribed for three hundred shares, of one hundred dollars, of the capital stock of said Hamilton, Lacon and Eastern Railroad Company to aid in the construction of said railroad from Lacon to the Illinois Central Railroad, and that, therefore, the Supervisor did not pursue the authority vested in him by said election, even had the same been legal, and that said subscription was not made to, or used in, building the Lacon, Hamilton and Eastern Railroad on the line of the American Central Railroad from Lacon to the Chicago & Alton Railroad, but on the contrary was made to aid in the construction of the Hamilton, Lacon and Eastern Railroad, from Lacon eastward to the Illinois Central Railroad, and was in fact used in building a railroad from Lacon, sixteen miles, to connect with the Chicago, Jacksonville and St. Louis Railroad, by the Chicago and Alton Railroad, as the road and property of the Chicago & Alton Railroad Company, and not the property of the Hamilton, Lacon and Eastern Railroad Company, and no part of the railroad of the latter company was in fact ever built, and the subscription as made, and the enterprise in which said

bonds were expended, were each substantially and fundamentally different from the enterprise voted for as specified in said election notice, and not so beneficial to defendant, and said subscription and bonds were therefore void. [For full text of plea see printed pp. 25, 26.] The fifth plea simply contains the general issue.

To the first, third and fourth pleas, plaintiffs below filed a general demurrer, which was sustained by the court. The case came on to be heard at the May term A. D. 1875, on issues joined by the second and fifth pleas. Plaintiff below read in evidence six municipal bonds and a number of coupons, described in plaintiff's declaration, a copy of which bonds and coupons are also given, except the number. Plaintiffs below proved by their own deposition that they purchased bonds and coupons, in the market, January, 1872, when the same were delivered to them at Boston, Masschusetts. See printed records pp. 28 to 30.

Defendant below objected to the admission in evidence of each of said bonds, because they were not endorsed in writing by the payee, claiming that plaintiffs below could not become the legal holders thereof, the same being domestic paper, without endorsement in writing. The court overruled said objection, to which ruling defendants below excepted in apt time. The above was all the evidence in the case.

At the request of the defendants below, the findings of the court were special, as follows: Said bonds were made and delivered to the Hamilton, Lacon and East-

ern railroad company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, for the purpose set forth in the plaintiff's declaration, and that the plaintiffs purchased the same in the market in January, 1872, for value, without any notice thereto, that none of said bonds were endorsed in writing by the said company.

Upon these findings, defendant below asked the court to hold that the right of action on said bonds were still in the original payees, and that the plaintiffs below, were not the legal holders thereof, and that judgment as to said bonds shall be in favor of defendant. The court refused to so hold, but held that the plaintiffs became the legal holders of said bonds by the sale and delivery thereof to them without any written endorsement thereon, and entered judgment for plaintiffs in the sum of over nine thousand dollars and costs, said judgment including the said six municipal bonds and interest on the same from their maturity, to which decision and rulings of the court upon said findings, defendant below, in apt time objected, all of which findings and rulings and judgment and exceptions, were then and there incorporated in a bill of exceptions, duly signed by the judge of the court below, as will be found by referring to printed record in the case, 28-31.

Upon the record of this case, a synopsis of which is here given, with references made to the pages of printed record on file, defendant below, in apt time, sued out a writ of error to the court below, bringing the

same to this court for review, and has assigned errors as follows:

First. The court below erred in sustaining the demurrer of defendant in error to pleas Nos. one, three and four, filed by plaintiff in error in court below, and court erred in not overruling said demurrer.

Second. The court erred in admitting in evidence, at the time the same were offered, each of the six bonds referred to in bill of exceptions, against the objections of the plaintiff in error made at the time; because the said bonds were not endorsed in writing by the payee,
32 the Hamilton, Lacon and Eastern Railroad Company, as defendants in error could not become the legal holders thereof, the same being domestic paper, without such endorsement in writing, according to the laws of Illinois and the decisions of the courts of Illinois and the court below erred in refusing to so hold and rule when requested so to do by plaintiff in error.

Third. The court erred in rendering judgment on said bonds in favor of defendants in error.

Fourth. The court erred in not rendering judgment on said bonds in favor of plaintiff in error.

Fifth. The court erred in rendering judgment in the case in favor of defendants in error.

And the said town of Roberts prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it be restored to all things which it has lost by occasion of the said judgment. (See record pp. 32-33.)

By the act of March 5th, 1869, (private laws, vol. 3,

p. 361), entitled "An act to authorize the incorporated towns and townships in the counties of Livingston, La Salle and Marshall, to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company", incorporates into it the following section of the act of March 6th, 1878, (private laws, vol. 1, p. 302), which reads as follow:

SEC. 1. That the counties of Woodford, La Salle and Livingston, and the townships, cities, etc. * * in said counties, * * may become subscribers to the captal stock of any railroad that now is, or hereafter may be, incorporated in this State, and may issue bonds to the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions and on such conditions as to them may seem right for the best interests of said counties, townships, cities, * * and the directors of said railroad company may approve of the proposition for any such subscription, the same having first been submitted to the legal voters of said county, townships, etc., * as aforesaid, and approved by a majority of said legal voters, who may vote upon the question, and upon the application of twenty legal voters and taxpayers of any county, township, * * aforesaid, specifying the amount to be subscribed, said amount not to exceed the sum of one hundred thousand dollars, for any one such county, township, city, * * to be subscribed for any one railroad company, * * and the condition of said subscription shall be set forth in said application, and it shall be the duty of any such county, township, city * * immediately to call an election by posting up notices at least twenty days * * in three of the most public places in said township *. Said election shall be held for the purpose of determining whether said township * shall subscribe to the stock of the railroad company, named in said call and notices, and if a majority of said

voters voting at said election, shall be for subscription, then the county court or Board of Supervisors, having jurisdiction over the county matters of said county, or the corporate authorities of such city, incoporated town, or the Supervisor of such township, shall make, or cause to be made, said subscription to said capital stock of said railroad company, and upon said subscription so voted, being accepted or received by the directors of said railroad company, shall cause bonds to be issued in compliance with said note." Words omitted above, indicated by stars, simply refer to other corporations than a township.

BRIEF OF PLAINTIFF IN ERROR.

PROPOSITION I.

1. By the statutes of the State Illinois, as uniformly construed by the Supreme Court of that State, the bonds described in declaration of plaintiffs below, could not be transferred so as to invest the legal title in the bearer, except such bonds be endorsed in writing by the Hamilton, Lacon and Eastern Railroad Company. Kilburn v. Artus, 3 Scamm, 344; Roosa v. Crist, 77 Ill., 452.

2. As the court below in deciding that the title to said bonds were in the plaintiffs, was enforcing the statute of Illinois making notes, bills, bonds, etc., assignable; and, by the uniform rule invariably held by this court, the courts of the United States, in enforcing State statutes, must adopt the clear construction of those statutes made by the highest tribunal of the State enacting the statute. This is not a question as to whether by the general commercial law of the country negotiable bonds are transferrable by mere delivery,

but whether the statute of the State of Illinois on that subject makes them so transferrable, as those bonds are issued, or pretended to be issued, under and by virtue of the laws of that State. The court below should have adopted the ruling of State Court and held that plaintiffs were not the legal holders of said bonds. Nesmith v. Sheldon, 17 Curtis, 416; United States v. Morrison, 4 Pet., 124; 9 Curtis, 27; Green v. Neal's Lessee, 6 Pet., 291, 10 Curtis, 119; Swift v. Tyson, 16 Pet., 1; Harpending v. The Dutch Church, 16 Pet. 494; 14 Curtis, 385; Adams v. Nashville U. S. S. C, 21, Township of Elmwood v. Marcy, 2 Otto, 289; Leffingwell v. Warren, 2 Black, 599.

PROPOSITION II.

1. The election mentioned in the bonds declared on was a nullity because called without authority by the Town Clerk, the application to him to call the same having been signed by only twelve legal voters and taxpayers, instead of twenty-four, as required by the law, and only ten day's notice having been given by the clerk, when the law required twenty days. See 3rd plea, printed record page 23. Private Laws Ill., 1867, vol. 1, p. 366, sec. 1; also of 1869, vol. 3, p. 361, sec. 1; People v. Kline, 63 Ill., 394; Chicago, Danville and Vincennes R. R, Co. v. Coyer et al., 79 Ill, 373; Marshall County v. Cook, 38 Ill., 44; Harding v. the Rockford etc. R. R. Co., 65 Ill., 90, and casees therein cited on page 92.

2. *As to innocent holders.* I concede that it is the

settled doctrine of this court, as first announced in Knox co. vs Aspinwall and as stated in the Town of Coloma v. Eaves, and restated in many other cases, "that where legislative authority has been given to a municipality, or its officers, to subscribe for the stock of a railroad company, and to issue muncipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact and binding on the municipality, for the recital is itself a decision of the fact by the appointed tribunal." But this rule of estoppel, as is above cited, depends upon the fact that the statute can be construed so as to constitute the officer designated to issue the bonds the tribunal to decide the fact as to whether the precedent conditions were complied with or not. The statute in this case, as has been construed and decided by the Supreme Court of Illinois, does not constitute the supervisor or the town clerk, either separately or associately, such tribunal; therefore, the sound rule of this court above set forth, does not apply in this case. Williams v. The Town of Roberts, MS. of the decisions of the Supreme Court of Illinois, January term, 1878, on file in the clerk's office at Springfield, Illinois. A certified copy of said decision, is affixed at the end of this pamphlet. Marshall

county v. Cook, 38 Ill. 44; Schuyler county v. The People, 25 Ill. 18; Supervisors of Hancock Co., v. Clark, 27 Ill. 305.

3. The construction placed upon the statute of a State, by the highest judicial tribunal of that State, becomes a part of the statute of the State itself, and is conclusive upon this court, where there is no prevailing conflict among the State Court decisions on the subject. See the cases cited in Point 2, of Proposition I of this Brief.

PROPOSITION III.

1. When the bonds in this case were issued, it was the well settled law of the State of Illinois, that when the legislature of the State authorized a municipality to subscribe stock to a railroad company and issue bonds in payment thereof, the law must be pursued in all its material requirements, else the bonds, when issued, will be void in whosesoever hands they may be found. Schuyler County v. The People, 25 Ill. 181; Supervisors of Hancock County v. Clark, 27 Ill. 305; Marshall Co. v. Cook, 44.

2. I conceive it to be a prominent doctrine of this court, that the construction which prevails in the state courts at the time municipal bonds are issued, upon qustions touching their validity, enters into, and forms a part of them as the settled law of those contracts, and that both the municipality issuing the bonds and the purchaser of the same are each bound by such con-

struction. Gilpecke v. City of Dubuque, 1 Wall. 175; Olcott v. Supervisors, 16 id, 678; Havemeyer v. Iowa County, 3 id. 294; Mitchell v. Burlington, 4 id, 270; Christy v. Pridgeon, id, 196.

3. This court has never held bonds to be valid issued after the Supreme Court of the State has held them invalid, even for reasons not involving the construction of a State statute, and evidently would not. Such a doctrine would not be necessary to protect the innocent owners of such securities, and would involve the consequence of the federal courts setting up a policy in a State contrary to its constitution and laws, as expounded by its authorized and rightful tribunals. Dillon on Municipal Corporations, vol. I, 2nd ed. § 416 b; King v. Wilson, 1 Dillon C. C., 555, 1871; Com. Bank v. Iola, 2 Dillon C. C. R. 1873.

PROPOSITION IV.

1. *The subscription not in compliance with the vote.*—In this case the enabling act requires that the application to the clerk of the township *shall* state the conditions of the subscription, and if a majority of the voters at such election shall have voted for subscription (provided, of course, that such election was legally held), then the supervisor shall subscribe the stock and cause the bonds to be issued, in "compliances with said vote." And as said application in this case sets forth one of the conditions of the subscription and the issuing of the bonds to be, that the amount subscribed should be used for the purpose of building a railroad

through the Town of Roberts, from Lacon, to connect with the Chicago and Alton railroad, a distance of fifty-one miles, and as the subscription was actually made to build a railroad from the city of Lacon eastward, through the Town of Roberts, to the Illinois Central railroad, a distance of twenty miles, the subscription of the stock and the issuing of the bonds were not made in compliance with said vote, but the same was a fundamental and essential departure from the terms of said vote, making a road not so beneficial to said town. Hence both the making of the subscription and the issuing of the bonds were without authority and void, and created no obligation on said town, even should the election have been legal. Defendant's fourth plea, printed record pp. 24-25. Private Laws, 1867, vol. 1, 866, sec. 1; Private Laws, 1869, vol. 3, 361, sec. 1; Fulton County v. the Mississippi and Wabash Railroad Co., 21 Ill., 369 373; S. & I. S. Ry. Co. v. Supervisor of Spring township, 72 Ill., 603; town of Big Grove v. Wells, 65 Ill., 263; Marsh v. Fulton Co., 10 Wall, 276.

PROPOSITION V.

The special act of the legislature of the State of Illinois, approved April 17, 1869, (Private Laws 1869, vol. 3, p. 302), declaring the subscription in this case to be legal and binding upon the town, and ordering the supervisor to issue the bonds, is invalid under the fifth section of the ninth article of the constitution then in force in the State of Illinois, because by that section it was not within legislative competency to authorize the

Supervisor, or the Supervisor and the Town Clerk, to create a corporate debt upon the town without the consent of the people, that consent in this case not having been obtained as provided by law. Lovington v. Widerf 53 Ill., 302; Harvard v. the Drainage Co., 53 Ill., 130, Marshall v. Silliman, 61 Ill., 218; Wiley v. Silliman, 6[illegible] Ill., 170; Town of Elmwood v. Marcy, 2 Otto, 289; Williams v. the Town of Roberts, appendix of this argument. The part of the above act referred to which applies to this case reads as follows:

"SEC. 2. *And be it further enacted*, That the subscriptions made to the capital stock of said company by the township of Roberts, for thirty thousand dollars, and by the township of Hopewell, in said county, for fifteen thousand dollars, and the several subscriptions heretofore severally made by the townships of Reading, Long Point, Newton and Sunberry, in Livingston county, be each legalized, and are hereby made valid and binding, according to the terms thereof; and the several supervisors of said townships shall issue, in due form, the bonds of their respective townships for the amount of stock subscribed for, according to the terms and conditions of said subscription, and shall deliver said bonds to said railroad company."

PROPOSITION VI.

The curative act recited in the last Proposition, while it is void as a legislative act, was notice to all purchasers of the bonds that the subscription was illegal, and gave such knowledge as should put a reasonable man upon his inquiry as to what that illegality was. It was certainly sufficient to require him to inquire of the public records of the town whether the election had

through the Town of Roberts, from Lacon, to connect with the Chicago and Alton railroad, a distance of fifty-one miles, and as the subscription was actually made to build a railroad from the city of Lacon eastward, through the Town of Roberts, to the Illinois Central railroad, a distance of twenty miles, the subscript on of the stock and the issuing of the bonds were not made in compliance with said vote, but the same was a fundamental and essential departure from the terms of said vote, making a road not so beneficial to said town. Hence both the making of the subscription and the issuing of the bonds were without authority and void, and created no obligation on said town, even should the election have been legal. Defendant's fourth plea, printed record pp. 24-25. Private Laws, 1867, vol. 1, 866, sec. 1; Private Laws, 1869, vol. 3, 361, sec. 1; Fulton County v. the Mississippi and Wabash Railroad Co., 21 Ill., 369 373; S. & I. S. Ry. Co. v. Supervisor of Spring township, 72 Ill., 603; town of Big Grove v. Wells, 65 Ill., 263; Marsh v. Fulton Co., 10 Wall, 276.

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Supervisor, or the Supervisor and the Town Clerk, to create a corporate debt upon the town without the consent of the people, that consent in this case not having been obtained as provided by law. Lovington v. Wider, 53 Ill., 302; Harvard v. the Drainage Co., 53 Ill., 130; Marshall v. Silliman, 61 Ill., 218; Wiley v. Silliman, 62 Ill., 170; Town of Elmwood v. Marcy, 2 Otto, 289; William v. the Town of Roberts, appendix of this argument. The part of the above act referred to which applies to this case reads as follows:

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been legally held or not, where, as is shown by the 3d plea, he would have ascertained that it was illegal. Under the light of these facts, defendants in error can not be held as *bona fide* holders, because they were warned by a published act of the State legislature of the State that said subscription was illegal and void, and that act being declared a public act by the legislature was no less a notice to defendants in error because it was unconstitutional. Birdsall 29 N. Y., 220. Said act really gave information that all former laws had been disregarded, and that the only real authority to issue the bonds was derived from the said act attempting to legalize the subscription and authorize the Supervisor to issue the bonds, and that all the purchaser had to depend upon was that act, and it being unconstitutional the bonds are void in his hands.

ARGUMENT.

In discussing the different propositions made in the preceeding Brief, I shall endeavor to make my address to YOUR HONORS as clear as it is within the compass of my ability so to do, and as brief as the prolixity of the points presented, and the gravity of the interests involved, will permit. I have quoted largely from the decisions cited in the Brief, in the hopes of more readily bringing the points therein made to the minds of the court, pointing out as near as may be, the exact portions of the different decisions and laws upon which the several propositions herein are founded.

PROPOSITION I.

Under this proposition in the preceeding Brief, it is proposed that the defendants in error are not the legal holders of the bonds in question, even if they were valid, because they are not endorsed thereon by the payee in writing, as required by the statutes of Illinois at the time of the issuance and transfer of the bonds, as at the time construed by the State Supreme Court of Illinois. In Hilburn v. Artis et al., 3 Scam., 345, the court said:

"We think there can be no question that, under our statute, notes, payable to a person or bearer, cannot be transferred, or assigned by delivery only, so as to authorize the holder by delivery, to sue in his own name. There is but one way by which he can do so, and that is, by virtue of the assignment endorsed on the note itself The endorsement gives the right to sue in the name of the assignee."

In Roosa v Crista, 17 Ill., 451, the court said:

"We have again considered attentively our statute concerning the transfer of promissory notes, etc., and adhere to the decision of this court made in the case of Hilburn v. Artis, 3 Scam., 344. The words of the statute are: 'Any such note, BOND, bill, or other instrument of writing, made payable to any person or persons, shall be assignable by endorsement thereon under the hand or hands of any such persons, and by his, her or their assigns, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee or assignees successively.' In that case it was held that this statute applied to a note payable to a person by name 'or bearer,' and that such a note could not be transferred, by mere delivery, so as vest the legal title in the bearer, so that the word 'bearer' in such a note is *surplusage*. So also in Shippington v. Puliem, 3 Scam. 385, it was held that by the same statute, the words 'or order,' are rendered surplusage and need not be averred in pleading. This statute had manifestly two objects to accomplish; one of which was to make notes, &c., negotiable, when the maker manifested no such intention, by inserting words to that effect in the body of the note; and the other was to restrict the expressed condition of the parties, by requiring a written endorsement to pass the legal title to the note, although the maker should manifest the intention to make it transferrable without endorsement, as where the words 'or bearer' are inserted. The object of this restriction was, no doubt, to protect the real owner of the paper against any one who might get possession of it improperly and without his consent. But were we at a loss to find an adequate motive for the provision, we should not feel at liberty to disregard the plain unambigious language of the law. Here is a note payable to a person whose name is expressed in the body of the note, and it is none the less payable to a

person because 'or bearer' is after the name of the payee. The statute declares how such notes shall be transferred, which necessarily *excludes all other modes of transfer.*"

Is not the federal court, sitting in Illinois, concluded by these expositions of the State statute? By those decisions, construing said statute, no bill, BOND, etc., made payable to any person or bearer, is assignable except by endorsement in writing. By the first plea below, and also by the special findings of the court below, the six bonds in this case were not assigned to the defendants in error by endorsement in writting, but by delivery only. The law and decisions above quoted were the laws of Illinois at the time the bonds were issued and purchased by defendants, and they specially applied to this case, therefore should not the court below, by those special findings, have adopted said laws as its rule of decision, and have refused to admit in evidence the six municipal bonds offered by defendants in error, and objected to by plaintiff in error, and have ruled that defendants in error were not the legal owners thereof and could not sue them in their own name? The Illinois court had said, as above quoted, that "the statute declares how such notes (bonds) shall be transferred, which necessarily excludes all other modes of transfer."

In that case it was contended by the note holder that inasmuch as the transfer had been made in New York, where the legal title of the note could be transferred by mere delivery, that the courts of Illinois

should recognize such transfer; but the court denied this proposition under the Illinois statute, and said:

"It is insisted, however, in this case, that as the note was transferred by delivery in New York, where by law, the legal title to the note could pass by mere delivery, the courts of Illinois should recognize such transfer. In other words, it is insisted that the law of the place where a contract is made, or an act is done, must fix and control the *status* of the parties in every other place. We cannot endorse this proposition thus broadly. The law of the forum must determine the mode in which relief will be administered. In some States no distinction is made between legal and equitable titles, in the forms of administering justice, while in others, as in this, the old forms are still adhered to. Because the forms of proceeding in New York or Pennsylvania will allow a man to enforce a given right in his own name, in their courts, it does not follow that he can enforce the same right in the same way everywhere. The mode of proceeding and the form to be adopted in the enforcement of a right, must be governed by the *lex fori*. Because our law allows the transfer of a legal title to a note, which does not, upon its face, provide for its transfer by the use of the words 'or order,' 'or bearer,' it would not follow that the assignee could enforce it in his own name in a State by whose laws no such transfer could be made Suppose, in New York, a book account could be sold on execution and the purchaser authorized to collect it in his own name, we could not recognize him as the legal owner of the claim, although we might afford him a substantial remedy by allowing him to sue in the name of the

original creditor. He must pursue his remedy here in the forms prescribed by our law." Here then the court founds all its reasoning upon the peculiar statute and laws of Illinois, and concludes by saying:

"We are of the opinion that, under *our law*, the plaintiff had no right, in our courts to pursue his remedy in his own name, and that the declaration was substantially and fatally defective, and that the circuit very properly arrested the judgment."

If he had no right to sue in his own name, under the law of Illinois, in the courts of that State, because of the meaning and construction given to it by its highest tribunal, applicable to the case, then, in the federal court he could not sue in his own name, because according to the law of Congress and rule of this court, such law and decisions are the rule of decision for the federal court in such case, while setting in that State, as was held in *Swift v. Tyson* and numerous other decisions of this court, to which more direct reference will be made in the argument under Props. II and III *post*.

It may be contended by counsel for defendants in error, that by the principles of general commercial law, municipal bonds, payable to some person "or bearer" are negotiable by mere delivery, and no doubt there are some authorities that way. And, for the sake of the argument, suppose we admit that it is the settled rule of this court, that by the general commercial law, bonds payable to some person "or bearer" are transferrable by mere delivery, without endorsement in writing.

Can this rule be held as denying to the State the right to require by statute, that such instruments must be endorsed in writing to be negotiated? Has not the State the right to supersede the common law, or the general commercial law of the world by statute? State Legislatures are created for the express purpose of changing, modifying or abrogating the common law or general commercial law, or the law merchant, as the people, through their representatives may desire, and when the legislature shall have done this by statute, each statute certainly becomes the rule of decision of the federal court when sitting in that State, in all cases where such statute is applicable,—that is in cases regarding the transfer of such negotiable paper. If a legislative act of a State declares that a certain commercial instrument shall be negotiable only by endorsement in writing, which by the general commercial law theretofore had been negotiable by mere manual delivery, then such commercial law is not applicable to such instrument in that State and thereafter no such instrument made in that State could be transferred, except by endorsement in writing. And, in a suit brought before a federal court sitting in that State, by the holder of such an instrument made in that State, such statute would clearly be the rule of decision on the question of transfer. This rule is clearly sustained in *Swift vs. Tyson*, *supra*., and many other decisions of this court. Any other view would deny to the States the right to regulate their own domestic affairs in their own way,

subject only to the Constitution, laws and treaties of the United States. It would deny to the States rights especially reserved to them by the federal constitution. It would be a solemn mockery to give to the States legislative power over their domestic concerns, and then deny to that power the right of superseding existing laws, whether the common, general, commercial, or the law merchant, by enabling the federal government to establish courts within the State, that should not recognize the acts of such legislative power. Such a view has never been even so much as hinted at, so far as I have been able to ascertain in any of the decisions of this court on the question. It cannot be claimed that the above statute does not embrace municipal bonds within its terms, as reference to the section preceding the one above quoted by the court, will dissipate any such idea. That section says: "All promissory notes, *bonds*, due bills and other instruments in writing, made or *to be made*, by any person or persons, *body politic* or *corporate*, where such person or persons promise or agree," etc Sec. 3, Chap. 73, Rev. Stat. 1845, Ill., and re-enacted by the revision of 1874. Then comes sec. 4, quoted above by the court, and says: "Any such note, *bond*, bill," etc., thus clearly embodying bonds issued by bodies politic or corporate, or in other words, municipal bonds.

Now, then, at the time these bonds in this case were issued and purchased by defendants in error, under

the statute of the State of Illinois, they could only be transferred in writing. Before that time the Supreme Court of the State had decided that by the statute, no bill, note, bond or any other instrument of writing requiring the payment of money or property, made to any person or bearer, could be otherwise transferred. This superseded the application of the general commercial law in this case, and the latter could not be the rule of decision in the federal court, nor of this court, but the statute must. The State decisions having been made at the time these bonds were issued and purchased by defendants in error, and thereby having become a part of the statute itself, they were bound to know that the statute law of Illinois was, that no such bond given for the payment of money or property, could be transferred except by endorsement in writing, whether the transfer be made in the State or out of it, that whatever the court might hold the general commercial law to be, it must hold, according to the uniform decisions of this court, that the statute of the State must apply in this case, and that if they should purchase such bonds without endorsement thereon in writing, by the payee, they would not acquire the legal title thereto, and could therefore not be entitled to sue in their own name. This was the settled law of Illinois at the time they purchased the bonds, and this they were bound to know. The transfer having been made in Massachusetts cannot make any difference, as we have seen, according to the statute of Illinois, as expounded by its highest court, and the statute is yet the same as it then was,

except that it has made any instrument payable to bearer without naming any person or payee, transferable by delivery, but all instruments made to some person, even if the words "or bearer" are added, can still only be transferred by endorsement in writing, as the section which has been expounded by the courts remains just as before.

PROPOSITIONS II AND III.

I am well aware of the fact that this court has vigorously sustained the rights of innocent holders of negotiable bonds throughout all its learned decisions, ever holding that a municipality is estopped from denying that the bonds which it, or its officers, may issue have been issued in material pursuance of the law authorizing their issue, when those bonds purport in themselves that they have been so issued. But this doctrine is rested in every case, upon the express condition, that the enabling act constitutes the municipal officer or officers issuing the bonds, the tribunal to decide whether the conditions of the enabling act, precedent to the issuing of the bonds, have been complied with. This, then, involves the construction of the act itself. The act in question in this case has been construed by the Supreme Court of the State of Illinois, which tribunal clearly declares that neither the supervisor nor the town clerk are constituted by the act the judge or tribunal to decide the question as to whether the precedent conditions required by the act, prior to

the issue of the bonds, were complied with, and affirming that, therefore, the town is not bound by the recitals of those officers, even as against *bona fide* holders. Under such a construction of this statute, of course the rule announced by this court, in Knox County v. Aspinwall and other cases, cannot apply.

In the case of *Williams vs. the Town of Roberts, supra.*, which was a suit brought on a coupon of one of the issue of the bonds in question in the case at bar, the Supreme Court of the State of Illinois, in construing the township organization act of this State, as well as the enabling statute in question here, said: "But under our system of township organization, there is no officer or board representing the corporate authority of the town. The electors only represent it, and they, in doing so, must and do necessarily act through town meetings, or town elections, and it is not pretended that they may or did bind the town in any other way.' So that according to the construction given to the Illinois township organization, no act of the supervisor or town clerk, in regard to the issue of the bonds, could bind the town, except it had been ordered by a legal town meeting or election, therefore, any recital they might make in the bonds would not be legal, so far as the township organization act is concerned. Again, the court in the same case says: "The supervisor or town clerk, neither separately or associately, are the corporate authority of the town. They are simply town officers with limited duties to perform in respect to

town affairs, whom the law [the enabling act] have appointed to discharge a ministerial duty in obedience to the direction of the town authority. They possess *no* POWER either as *town officers* or UNDER THE STATUTE, except under the direction of the corporate authority of the town, to do *any act*, in regard to making the subscription, or issuing the bonds." Clearly then, they had no right under the statute to decide and recite whether the statute had been complied with or not, and by such decision and recital bind the town in any manner whatever. The court says they are mere ministerial officers, whom the statute has not clothed with any judicial power whatever, that in this instance the law, the enabling act, simply appointed them to discharge a ministerial duty, and did not invest them with the powers of a tribunal to determine facts and decide, in a binding way upon the town, as to whether a legal election had been held or not, because the court says positively that neither one or both of those officers can do any such acts to bind the town as against anybody. It may be said that this reasoning of the court was used while deciding as unconstitutional the curative act, which pretended to ratify the subscription in this case which is true; but when they came to discuss the question as to whether *bona fide* holders are protected by the recitals in the bonds, the court said: "*As we have seen*, a town must act through its electors, either to ratify an act already done, or to authorize a future act, when its acquiescence is material, and there

having been here no such act, there can be no estoppel." Thus the court refers to the very reasoning we have been quoting, to show that the statute gave the Supervisor no right to bind the town by mere recitals, and therefore the statute did not constitute the Supervisor and Town Clerk, or either, as the judge to decide whether the law had been complied with, because if it had, his recitals would bind the town. The court refers to the doctrine held by this court, and holds it not applicable, and gives as the reason that the agent or Supervisor of the town, under the statute, cannot invest himself with power to bind the town, and his individual act, unknown and unsanctioned by the town cannot be held to estop the town from denying the power of the Supervisor to act, because the town can only act through its electors, to ratify an act before done, the law not giving the Supervisor and Town Clerk, or either, that power—not giving them the power to say, in a binding way upon the town, that the election had been called and held in pursuance to the law. If the court could have gathered from the enactment that the Supervisor, or the Supervisor and the Town Clerk were made by it the judge as to whether the election had been legally held and the law materially complied with, then, of course, it would have held that the Supervisor could bind the town with his recitals in the bonds as against *bona fide* holders, and that the bonds in such holders hands would be good. But after construing the statute, and being unable to find in it any such power given to the Supervisor, the court have held that neither the

Supervisor nor the Town Clerk can so bind the town, and therefore the court have held the bonds void, even in the hands of a *bona fide* holder under the statute.

Now, then, I concede that this court does not consider itself bound, in all cases, by the decision of a State court, except when such State is construing its own statutes, customs or constitution. That where State courts found their reasoning upon the general commercial law of the country, this court reserves the right to follow its own judgment in making its decision. But where the construction of a statute is involved, this court has invariably held, without exception, that the construction given to a State statute, by the highest judicial tribunal of the State, becomes a part of the statute itself, and is as conclusive upon this court as the statute is, unless the State court sometime prior to the issue of the bonds had given it a different construction, which is not the fact in regard to the statute in this case. There is a long line of decisions of this court enunciating the rule that it will be bound by the construction of a State court of a State statute.

In *Green v. Neal's Lesse*, *supra.*, the court held so tenaciously to this rule that it reversed its own decision in order to conform with the decision of the State court. Your Honors will remember, this was a case where the supreme court of Tennessee had first construed its law of limitations in accordance with a certain view, and while such construction obtained, this court made a

decision adopting that construction. Subsequently, the state court, after a full and elaborate investigation, changed their construction of said law, giving it a very materially different operation, as a rule of property. The question then arose whether this court should change its decision so as to conform to the new, but settled expose of the law by the state court. The question is elaborately discussed, and we desire to quote profusely from this decision, not so much to prove the rule that this court will be concluded by a state court construction of its own statute, as to show that the reasonings of the court very clearly demonstrate that the rule is distinctly applicable to the case at bar. The court said: "Would not a change in the construction of the law of the United States, by this tribunal, be obligatory upon the state courts? The statute as last expounded would be the law of the Union; and why not the same effect be given to the last exposition of a local law by a state court. The *exposition forms a part of the local law*, and is binding upon all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State which the federal courts while sitting within the State, and this court, when a case is brought before them, are called to enforce." Further on the court continues, "If the construction of the highest judicial tribunal of a State forms a part of its statute law, as much as an enactment of the legislature, how can this court make a distinction between them? There could be no hesitation

in so modifying our decision as to conform to any legislative alteration of the statute; and why should not the same rule apply where the judicial branch of the State goverment, in the exercise of its acknowledged functions, by construction, gives a different effect to a statute from what it had first been given? * * * * The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee, that an adverse possession of seven years, under a deed for land that has been granted will give a valid title. But by the decision of this court such a possession will not give a valid title. * * * Here then is a judicial conflict, arising from two rules of property in the same State, and the consequences are not only deeply injurious to the citizens of the State, but calculated to engender the most lasting discontent."

Now then, let us apply the principles herein announced, to the case at bar. The construction put upon a statute becomes a part of the statute. Here then is a statute of the State of Illinois, authorizing the Supervisor of a township to issue bonds to aid in the building of a railroad, after there shall first be an affirmative vote of a majority of the electors of the town authorizing the subscription of the stock to such railroad company, at an election called by the Town Clerk on the application of twenty-four legal voters and taxpayers of the town, by posting up notices of the election at least twenty days. The highest tribunal of the State construes this statute in a case involving the

validity of the bonds issued by the Supervisor and Town Clerk upon the application of only twelve legal voters and taxpayers instead of twenty four, as the law requires, and by giving only ten, instead of twenty days notice of the election, and for the sake of this branch of the argument we will say the bonds seem to recite that the law was complied with. The court decides that under the statute, the Supervisor and Town Clerk neither seperately or associately has the right to bind the town with their recitals as against *bona fide* holders, because the statute does not authorize them to do any act except as directed by the electors. Does not appoint them the tribunal to decide whether the election was legally held or not. This decision becomes a part of the statute, according to the rule of this court, as much so as if it was incorporated bodily into the statute itself, because the State court has said that it was incorporated into the statute in meaning, and in fair construction of language, at the time the act was passed. Then in the case at bar, this court cannot gather from the enactment that the officer designated to issue the bonds is the tribunal to decide whether the act has been complied with, because the act as construed, says to the contrary; and therefore, by the law and well established rule of this court, the *bona fide* holder is not protected by the recitals of the bonds themselves, as by the law, as construed, the officer issuing the bonds is not authorized to make such recitals in a binding way upon the town, therefore, the

purchaser must learn for himself whether the law was complied with; he is required to look further than the enabling act, by the authorized construction of the act itself. He must examine the public records of the town, or cause it to be done, and there ascertain whether the election was legally called and held, because the law declares no tribunal to do this for him, and if he does not, he must be held as purchasing the bonds at his peril. This would have been no hardship Had he done so, he would have ascertained according to the third plea below, that the application to the town clerk was insufficient, being signed by 12 instead of 24 legal voters and taxpayers, and that the notices were posted up only ten days instead of twenty.

The fact that the construction of the State statute comes after the issuing of the bonds cannot be material, because the purchaser had to take his chances as to how the highest court of the State might construe the law, and he had notice by the well settled rule of this court that it would conform to the construction given by the State tribunal, if that tribunal has not given a contrary decision at the time the bonds were issued and negotiated, which it had not. In the case of *Township of Elmwood vs. Marcy, supra*, this court held itself bound by the construction of the State constitution, made by the State court, each of which decisions making such construction were made after the bonds were issued.

And further, this kind of statute was clearly con-

strued in three or four decisions of the Supreme Court of Illinois, long before these bonds were issued, and was construed in exact conformity with the decisions above quoted, so that all purchasers were presumed to know that the court would expound this statute in the exact manner that it has.

In *Marshall County vs. Cook*, *supra.*, which decision was rendered in April, 1865, six years before the bonds in question in this case were issued, is an elaborate review of the question of complying with a statute authorizing a municipality to issue bonds in aid to railroads, and stating the results of the non-compliance with the material as well as the immaterial requisites of the law, holding that in the former case, the bonds are invalid absolutely, while in the latter the non-compliance may be cured by the issue of the bonds. In that case the court has presented an emphatic, unambigious construction of the statute, as to whether under the statute the officers designated by the statute to issue, or order the issue of the bonds, had the power under the statute to bind the municipality as against the holders without notice, by issuing the bonds without the law first having been complied with, and as to whether the purchaser need look further than the law authorizing the officers to act, or whether he must look to the records of the municipality, and ascertain whether they acted in material compliance with the law. I say that the Supreme Court of that State in that case decided those questions in terms so plain, that no purchaser of municipal bonds could have the least possibility of

doubt as to his duty in the premises. Let us see. This was a case where by the law, the Board of Supervisors were the authority to call the election, while the election was ordered and called by the county court. The Court said:

"It is virtually admitted that the bond and coupon were irregularly issued, but it is insisted that the subsequent acts of the county render them valid and obligatory upon the county. Also, having been negotiated for a valuable consideration before their maturity, without any other notice than such as the law charges, the county cannot interpose a defense to them in the hands of such a holder. The first of these questions is one of power. And it depends upon the fourth section of the act of 1849, (States Comp. 95), which declares that no subscription or purchase of stock shall be made or bonds issued, by any county or city, under the provision of the act, creating a debt for the payment of such subscription, unless a majority of the qualified voters of such county or city shall vote for the same. It requires the notice of thirty days, giving the time of holding the election and requiring them to vote for or against the subscription."

The court then examines the township organization act and concludes that the Board of Supervisors constitute the proper authority to order the election and not the county court, and further said:

"From these it is manifest that these bonds were issued without such an election, as the law contemplates. Nor can an election ordered and held without authority of law be held to answer the requirements of the statute. * * * * A legally ordered election is by the law made an essential prerequisite to the exercise of the power. And action by the county authori-

ties without performing such an act, is unwarranted, and not only so but prohibited. The provisions requiring the election, and prohibiting the issue of bonds from being issued until the question is passed upon and authorized by a vote, was no doubt designed to protect the county from improvident action and is salutary and proper in its operation. It has been held that in the absence of such authority confered upon the county agents by an election properly called, they will not be compelled to issue the bonds. *Schuyler County v. The People*, 25 Ill., 181; *Supervisors of Hancock County v. Clark*, 27 Ill., 305; *Fulton County v. Mississippi and Wabash Railroad*, 21 W., 373; and *The People v. Tazewell County*, 22 Ill., 147. And as between the county and the first holder, or in the hands of a person holding such bonds with notice that they were issued without authority, there can be no doubt that they are absolutely void."

The court then proceeds to discuss the difference between political and private corporations and in concluding on that point said:

"Another broad distinction exists between the two classes of corporations. The business and proceedings of a private corporation are not public, whilst those of municipal corporations are open to the examination of the public. All their proceedings are enrolled and become a matter of public record, and open to the inspection of all persons. On the other hand, the journal of the proceedings of a private corporation is not accessible to the public, or to any one but the members of the body. It thus follows, that persons dealing with municipal corporations have the right to examine and see whether all the steps required by their charter have been taken. It is otherwise with private corporations. Those dealing with them can only examine their charter, and if it is found that the body had, under

any circumstances, power to create the indebtedness, the holder will be protected, unless it appears that he was informed that it was in violation of their charter. But with municipal bodies, whose records are open to the examination of all, there is not the same reason to protect the holder, as he may fully inform himself whether their action is warranted. That such a body may create a debt binding upon it, there can be no question, simply by complying with the substantial requirements of the charter, nor will slight or immaterial deviations from the mode prescribed invalidate securities in the hands of innocent holders, for a valuable consideration. Such was the rule announced in *Johnson vs. Stark county*, 19 Ill. 406. But on the other hand, if the body assuming to act has no legal authority to create the debt, or if they *exceed their authority* or omit some *essential prerequisite*, the bonds are a nullity. *Schuyler county vs. the People* 25 Ill. 181; *Supervisors of Hancock county vs. Clark*, 27 Ill. 305. * * * * * In case of public officers, from the highest to the lowest, they must act within the scope of their authority, or their acts will be void. And courts, to render their judgments and decrees binding, must have jurisdiction of the subject matter of the parties. And the power in all such cases is derived from law. * * Where a person purchases property at a sheriff's or master's sale, to render his purchase availing, he must show that there was a valid and binding judgment or decree, and an execution in one case and an order of sale in the other. It is not sufficient to show an execution without a judgment, or even judgment, where the court had no jurisdiction of the subject of litigation, or of the parties. It is not sufficient that it appears that the officer had, under any circumstances, power to perform the act, but it must appear that he posessed the power in the case in which he performed the act. Nor can the question of the *bona fides* of the transaction be considered. In

such cases the bidder purchases at his peril, and so of his assigns. It is a question simply of power and not good faith. The maxim of *caveat emptor* applies to the acts of public officers. * * * And we have seen that the Board of Supervisors were alone authorized to call the election, and that the court acted without authority. And in doing so, the election conferred no more jurisdiction on the Board of Supervisors than if it had been ordered by the sheriff or constable of the county. *Schuyler County v. The People*, 25 Ill., 181. In this case all the avenues were open to the purchaser. The authority to issue the bonds is derived from a public law, which he no doubt examined, and whether he did or not he was bound to know its requirements. From it he saw that the Board had no power to issue these bonds until an election had been ordered by them, and resulted in favor of their being issued. Such an order would, of course, appear upon the public record of their proceedings, to which he had access, as fully as the person proposing to purchase at sheriff's sale has to the record of the judgment under which the sale is proposed to be made. Nor is it harder to require the purchaser of a bond to examine the record to ascertain whether the Board had jurisdiction to act, than to require of the purchaser to ascertain whether the court had jurisdiction to render the judgment."

"After a careful review of all the reasons which induced the decisions in the cases of *Schuyler county vs. the People* and *Hancock vs. Clark*, we have no reason to change or modify the conclusion at which we then arrrived. In the first of these cases the Board of Supervisors had called the election and issued the bonds, when the law under which they were acting only authorized the county court to call it, and issue the bonds, and it was held that the bonds were absolutely void, even in the hands of Farwell, who, for aught that appears, acquired them in due course of business, for a valuable consideration. In the latter of these

cases, we said, 'if an election were held without warrant of law, or if it were ordered by a person or tribunal having no authority, there could be no doubt that the whole proceeding would be absolutely void. Such an election, and every subsequent step, would be unauthorized and void, and therefore incapable of ratification by the county authorities.'"

Now then do not all those uniform decisions of the State court in this case become binding upon this court, as the laws of the State in force at the time the bonds in question were issued? And do not those decisions become a part of the contracts themselves, and also a part of the statute under which these bonds were issued? The decisions are: that where a legislative act authorizes a municipality to issue bonds to aid the building of a railroad, that the law must be followed in all its material requirements, else the bonds shall be absolutely void in whosesoever hands they may be found. That all purchasers must take notice of any failure to follow any material requirement of the statute disclosed by the public records of the municipality; and does not those decisions become a part of the statute law of the State, according to the repeated rulings of this court? Those decisions are in fact a construction of the State statute. They constitute a ruling of the court that the statute does not authorize the municipal officers designated to issue the bonds, to issue them, or do any act in the issuing of them whatever to bind the town, as against anybody, unless the material requirements of the enabling laws first be complied with. It is an em-

phatic declaration by the court, that the statute, which is similar to the one to be construed in this case, does not constitute the officers designated to issue the bonds the tribunal to decide whether the enabling law has been complied with. The court quote the statute, and reason from the statute, saying that *no act* of such officer is warranted by the statute, or binding upon the municipality, until at an election as pointed out by the statute had been held. If the court did not positively hold in those decisions that the officers designated to issue the bonds were not, by the statute, invested with power to decide whether the prerequisites of the law had been complied with, then they could not have decided that said officers could not bind the town until the subscription had been voted by the people at a legal election, because had they been invested with such power, they could bind the municipality by the exercise of such power. But it was the exercise of just such power on their part, that the court said the statute did not warrant.

Thus we find that in the case of *Williams v. Town of Roberts, supra*, the supreme court of Illinois founded its decision, in construing the enabling act in this case, and in holding these bonds void in every holders hands, upon the prior uniform decisions of that court, made before these bonds in question were issued, and completely takes this case out of the rule in *Knox County v. Aspinwall*. Of this there certainly can be no doubt.

Now, the enabling act, in the case at bar says that

the town, by its Supervisor, may issue bonds in aid of a certain railroad company, if the town by a majority of its electors shall subscribe to the capital stock of the company, at an election called by the Town Clerk, on the application of twenty-four legal voters and taxpayers of the town, by posting up notices in three of the most public places of the town at least twenty days. At the time this act was passed, we positively find there was a well settled rule of decision by the supreme court of the State, that unless the material requirements of just such a statute as this, and therefore, of this statute, are followed, the bonds, if any be issued without such material fulfillment of the statute, shall be null and void in whosesoever hands they may be found. That the law charges all persons with notice of any failure to follow the material requirements of the statute, that may be disclosed by the public records of the town. This rule of decision became a part of this statute, as soon as the statute was enacted, because the rule was made by the court with direct reference, and through the construction of just such a statute. The rule of this court positively and clearly defined in *Green vs. Neal's Lessee*, *supra.*, and again set forth in *Leffingwell vs. Warren*, *supra*, in the following language: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the court of the United States as the text," and which rule is also recognized in many other decisions up to a late date, applies directly and happily here,

because by this rule of this court, the statute we have just been referring to, that is the enabling act in this case, has the very same effect as if the legislature, at the time of its passage, had added to it: "This act shall not be construed so as to invest the officers designated to issue the bonds with the power to decide whether the conditions precedent have been followed, and all purchasers of any bonds claiming to be issued under this act, shall be and are charged with notice of any failure to comply with the material requirements of this act that may be disclosed by the public records of the municipality, and if the material requirements of the law shall be followed in the issuing of the bonds, and the public records of the municipality shall disclose that fact, then such bonds will be void in whosesoever hands they may be found." This would only be making the decision as binding as to incorporate the decision into the text of the statute. Certainly every dictate of common sense, every element of logic, analogy, and parity of reason, as well as every sentiment of justice, will bear me out in this reasoning. How could it be otherwise? The rule positively declares that the construction given to a State statute must have the same effect as if incorporated into the statute in the manner I have suggested.

I now desire to examine the decisions and opinions in those cases wherein this court has declined to be bound by State court decisions, and I think I can fully demonstrate that not one of them apply to the case at

bar. The first leading case on this point is *Swift v. Tyson*, 16 Pet., 1. But this was simply a suit brought on a bill of exchange by a *bona fide* holder, which bill was accepted as payment of a pre-existing debt, and the court said:

"And the only real question in the case is, whether under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments."

The court then proceeds to examine the decisions of the New York courts upon the subject, and after finding them somewhat conflicting, said:

"But admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon the court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point, upon any *local statute*, or *positive*, *fixed*, or *ancient local usage*; but they deduce the doctrine from the general principles of the commercial law. It is, however, contended that the 34th section of the judiciary act furnishes a rule obli-

gatory upon this court to follow the decisions of the State tribunals in all cases in which they apply. That section provides 'that the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section, includes within the scope of its meaning the decision of the local tribunals. * * * In all the various cases, which have hitherto come up before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the *construction thereof*, adopted by the local tribunals, and to rights and titles and things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature or character."

Thus it will be seen, that in the case just quoted, as this court therein states, the courts of New York did not found their decisions upon any local statute whatever; nor upon any positive, fixed or ancient usage, but deduced their doctrine from the general principles of commercial law. Not so in regard to the decisions herein quoted from Illinois. The case of *Williams v. Town of Roberts*, which holds invalid the identical bonds in question in this case, is all founded upon the positive statute of the State, but for which statute no bonds of this description could have been issued by plaintiff in error under any circumstances whatever. That decision construed the meaning of that statute, as

to whether by it the Supervisor could or did bind the town as against a *bona fide* holder, by issuing the bonds without a legal election first being held, authorizing them, and the court decides that the statute gave the supervisor no such power. Neither to him nor the town clerk, separately or associately. Is this not, then, a construction of a positive statute of the State of Illinois, adopted by the local tribunal invested with power to expound the statutes of the State; and as such, is it not binding upon the court, by the very last words above quoted from *Swift v. Tyson*? If not, then language has lost its meaning and it is useless for men to hope to make themselves understood by any form of expression whatever.

So in the case *Marshall County v. Cook, supra*, and those cited in support thereof. The records of the court in that case were founded upon the statute of the State, construing its meaning and legal effect, deciding that under the statute the county board could not bind the county, even against *bona fide* holders, by issuing bonds without first an affirmative vote of a majority of the people of the county was given, at a legally ordered election. That said officers were not therefore invested with power to decide, in a binding way upon the county, whether such precedent condition had been performed.

In the case of *Butz v. Muscatine*, 8 Wall, 578, a majority of this court declined to be bound by the decisions of the supreme court of Iowa, because by following them would affect the remedies of creditors which

are protected by the Constitution of the United States, and by the reasoning of the majority, had the cases in which those State court decisions were made been appealed to this court, it would have entertained appellate jurisdiction, so that that decision of this court can not be applicable to the case at bar.

In *Olcott v. The Supervisors*, 16 Wall., 678, the court declined to be bound by the decision rendered by the supreme court of Wiconsin, deciding a certain statute unconstitutional, the latter decision thereby holding certain bonds invalid. But the majority of this court, refusing to be so bound, held that the State court gave no construction to the State constitution. The court said: "The question by the [State] court was not one of interpretation or construction. The meaning of no provisions of the State constitution was considered or declared." The majority of this court in the last mentioned case also found that at the time the bonds in question in that case were issued, they were valid by former decisions of the supreme court of the State of Wisconsin, and that this court would therefore hold them valid, even though the supreme court of the State by a subsequent decision, made after the bonds were issued, might declare them invalid, and so this case in no event has any application to the questions at issue in the case at bar.

In the cases of *Gelpcke v. City of Dubuque*, 1 Wall. 175, and *Lee County v. Rogers*, 7 Wall. 181, the majority of the court refused to be concluded by the latest

decrees of the Supreme Court of the State of Iowa, holding a certain law of that State unconstitutional, thereby invalidating certain bonds, because the Supreme Court of that State had held, in seven decisions prior to the issue of the bonds, that the law was constitutional and the bonds valid, and that strangers had bought those bonds relying upon those decisions, before the decision making them invalid had been made. The majority of this court then said: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decisions of its courts altering the construction of the law.'" As all the decisions of the Supreme Court of Illinois upon which we rely in this case, and ask this court to adopt, except *Williams v. Town of Roberts, supra*, were made prior to the issue of the bonds in question, and as at the time these bonds were issued, there was no decision of the Supreme Court of the State making such bonds valid, but the uniform decisions of the State courts at that time held them invalid, then *Gelpcke v. City of Dubuque* and *Lee County v. Rogers* can have no application here.

In the case of *Schenck v. The Board of Supervisors*, 5 Wall, 772, this court declined to be bound by the

case of *Marshall County v. Cook*, 38 Ill., 44, *supra*, and held the bonds valid, which in the latter case the State court had held invalid. But a careful examination of the former case will show that the reasons assigned by this Court for not conforming to the decision of the State court do not obtain in the case at bar, and do not preclude this court from being bound by the same decision, in the doctrine it announces which we have applied in this case. The court in that case not only decided, that the statute providing for the issue of the bonds did not authorize the Board of Supervisors to bind the county, even against holders without notice, unless there had been first an affirmative vote of the people of the county, at a legally ordered election, but it also decided that the levying of taxes by the Board of Supervisors of the county for eight years and the payment of those taxes by the people without objection or protest, did not constitute a ratification of the bonds, if the election pretending to authorize their issue was not legally ordered. This last conclusion this court held, was not arrived at through a construction of the statute, but from an investigation of the general principles of commercial law on subsequent ratification and this court on that question, claimed the privilege of construing such principles according to its own judgment, and on this point were not bound by the State court unless the opinions of this court conformed with the opinion announced by the State court. This court in that case, held that each levy of taxes by the Board of Supervisors and the payment of the same by

Such

the people without complaint or protest for so many years, amounted to a ratification. The court at this point said:

"And yet they constantly suffered themselves to be represented in the choice of officers and the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, *and actually paid the same*, as admitted in the special plea. Examined in the light of those suggestions," this court continues, "it would be difficult to imagine a case where the rule that a subsequent ratification is as good as a previous authority, can be more justly applicable than in the case under consideration." These are evidently the reasons why the court in a subsequent paragraph remarked that the question of the valdity of these bonds "in the hands of innocent holders, without notice, is a question of commercial law where the State adjudications although entitled to great respect, do not furnish the rule of decision in this court." Further, this court clearly intimates in these considerations just mentioned, that they would have conformed to the State court decision, had it not been for the fact that this court conceived that prior to the issue of the bonds then in question, the supreme court of Illinois had announced a doctrine that would make the bonds valid in the hands of holders without notice of their infirmities. On this point this court thus said:

"Prior decisions of the State court were in accordance with the decisions of this court, and those decisions were supposed to be the correct expositions of the law of the State at the period when these bonds were issued, the latter adjudications cannot control the judgment in this case."

Had those latter adjudications to which the court alludes have been made prior to the issue of the bonds, clearly this court would have felt bound by such adjucations, and would have held the bonds invalid. But as it was, the Court followed the doctrine of *Gelpcke v. City of Dubuque*, and held that it would follow the law as expounded by the local tribunals at the time the bonds were issued. Then, as in the case at bar, there was no levy of taxes by the town authorities, and voluntary payment of them by the people, not even to pay the interest on these bonds. and as there were no Illinois court decisions holding such bonds good at the time those here in question were issued, but on the contrary, all the Illinois decisions at that time held such bonds invalid in whosesoever hands they might be found, then clearly *Schenck v. the Supervisors*, as all the other cases where this court has not conformed to the decisions of the State court, is not analogous to the one at bar.

Again, have we not ascertained beyond all peradventure of doubt, by the review of authorities herein made, as alleged in Prop. III. of Brief, that it is a permanent doctrine of this court, that the construction which prevails at the time of the issue of municipal

bonds, upon questions touching their validity, enters into and forms a part of them, as the settled law of those contracts? In *Alcott vs. the Supervisors*, the court said:

"This court has always ruled that if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as understood at the time, no subsequent action of the legislature or the judiciary will be regarded by the court as establishing its validity. Such a rule is based on the highest principles of justice. Parties have a right to contract, and they do contract in view of the law *as declared to them when their engagements are formed.*"

If the above rule is based upon the highest principles of justice, if the rights of the purchaser demand that this court shall recognize such rule in order to protect him in his purchases in good faith, then do not as equally high principles of justice demand, on behalf of the unwary tax-payer, that this court should hold invalid bonds, which were invalid under the constitution and laws of the State, as previously expounded by its highest judicial tribunals, and as understood at the time? Now, then, were not the bonds in question in this case, when issued and negotiated, absolutely void, in whosesoever hands they might be found, under the constitution and laws of the State as *previously* exposed by its highest judicial tribunal? We have ascertained by three decisions of the Supreme Court of the State, where the question was elaborately discussed by the court, and where all prior decisions

were examined and explained to conform with these three, that where the legislature authorize a municipality to issue railroad bonds, that all the material requisites of the law must be complied with before the bonds can rightfully issue, and if they be issued without such compliance, they are void in every holder's hands whatever, and that if the public records of the municipality disclose the fact of the non compliance with the material requirements of the law, such is notice to everybody of that fact. We find, also, by the third plea of the defendant below, that the election held in this case was called by the Town Clerk by virtue of no authority except on the application of twelve legal voters and taxpayers where the law required the application of twenty-four legal voters and taxpayers, and that only ten days notice were given when the law required twenty days notice, and that said application, and said notice have been on file among the public records of the town at the town clerk's office, and that the date of said notice shows that it was only made ten days before the election was held. (Ante p. 4.) Here, then, is a positive failure to comply with two material requirements of the statute. There can be no doubt as to the materiality of those requirements. They were designed by the legislature to give a full and free opportunity to be heard and therefore most material. They were so material, that if not regarded, one-fifth of the voters of the town, holding scarcely any property whatever, might convene together and vote a hundred thousand dollars of bonds

upon the people simply because the people were not sufficiently notified to learn that the election was to be held. If the clerk could legally call the election by giving ten days notice when the law required twenty days, then he could just as well give but ten minutes notice, on the application of one legal voter and taxpayer, and enable a dozen men to organize an election and vote thousands of dollars out of the pockets of the taxpayers of the town, while they were busy at their shops and farms, in entire ignorance of the fact that an important special election was in progress. I make these suggestions to show that the material requirements of the law were not followed prior to the issue of the bonds, and also, the plea in this case shows that while a majority of the voters present voted for subscription, that vote was not a majority of the voters of the township. Had the full notice, on a complete application been given, the vote might have been against subscription. The requirements disregarded in this case, were much more liable to result in hardship to the voters than those held to be material in the State court decisions above quoted.

Now then, as before remarked, we find that bonds of this description at the time they were issued, were void in every holders hands whatsoever, by the uniform decisions of the State court, previously made. I say uniform, because the three latest decisions previous to the issue of the bonds in question, reviewed all former decisions, explained them, and held them to be in conformity with

the doctrine the court was then announcing. See also first paragraph of *Williams v. Town of Roberts* as to the rule. Now, then, if it be the settled doctrine of this court where contracts regarded as valid by the laws of the State, as previously expounded by its judicial tribunals, that this court will hold them valid, even though subsequently held invalid by the State tribunal, then ought not the rule to be extended to hold the bonds in this case invalid, under the circumstances presented. Certainly justice, and common sense, and fairness, and every sound principle of construing law known to judicial reasoning will say that the rule should be so extended. There certainly is no reason why this court should hold as valid, any bonds that were invalid by the decisions of the State courts at the time they were issued. Judge Dillon, in his celebrated and able work on Municipal Corporations, Vol. I, § 416 b, in speaking of this court on this subject, said:

"It has not decided that it would hold valid bonds issued after the Supreme Court of the State had held them to be invalid, and it would not probably so hold, since such a doctrine is not necessary to protect the innocent owners of such securities, and would involve the consequence of the federal courts setting up a policy in a State contrary to its constitution and laws as expounded by its authorized and rightful tribunals."

To further carry out the idea of the learned commentator here advanced, let us take for example the case at bar. How can the defendants in error justly complain of any injustice? Should this court hold

these bonds invalid in their hands? When they purchased them they saw that they were municipal bonds, and they were therefore bound to know that it required a special legislative enactment to authorize their issue. When they examine the act, they find that before the bonds can be issued, that certain conditions must be performed before they can be legally issued. Next they examine the decisions of the State courts upon the question, as they are likewise bound to do, and they find by the settled construction of the highest judicial tribunal of the State construing such statutes, that if all the material requirements of the statute have not been followed in the issue of the bonds, they are void in whosesoever hands they may be found. They find also, that those decisions say, that if the purchasers desire to be safe, they must examine, or cause to be examined, the public records of the municipality, and ascertain whether the election was ordered by the proper authority, and whether such notice as is required by the law was given, and in the language of the decisions, see by the records of the municipality whether all the material requirements of the law has been complied with. There was the law of the State clearly defined. They were not compelled to purchase the bonds if they were not pleased with all the safeguards that the statutes of the State as expounded by the courts, threw around the taxpayer. But if they desired to invest, they could have caused the records of the town to be examined, which were public to every

body, and there they would have ascertained that only ten days notice had been given, when twenty days were required, that the clerk called the election on the application of twelve legal voters and taxpayers, when the law gave him no authority to call it, except on the application of twenty-four such persons, and the application and notice of election were on file in the Town Clerk's office ever since the election was held. If the defendants in error have neglected to do this, as notified by the laws of Illinois then in force, and have paid their money for bonds inflicted with infirmities which the public records of the town would have disclosed to them, shall the taxpayers of the town be made to suffer, and be made to pay an illegal claim, one which they never contracted to pay, and one which in all probability the majority of the voters never intended to contract to pay; or shall the bondholders be held to suffer, they, who had they followed the *plain* directions of the law, might have easily learned the fatal defect in the so-called obligations. As the learned commentator above quoted has stated, it is not necessary in this case for the court to depart from the decisions of the State of Illinois, to protect innocent owners of the bonds, and by so doing, involve the injurious consequences of two opposite laws on the same subject in the same State. If this court be unable to protect the defendants in error as holders of these bonds, without notice of the defense, it is no fault of the court, nor the law, but it is the result of their own lack of vigilance in not seeking the notice where the law plainly

told them they could find it. If the failure to comply with this law was of such a character, that the defendants in error could not discover it on the face of the town records themselves, such as to whether the subscribers to the application to the town clerk to call the election were tax-payers, or legal voters, something that could not appear on the face of the records themselves, then, of course, there might be some reason for the argument for protection to the holder without notice. There is no rule anywhere announced by this court, there is not a single decision to be found throughout all its adjudications, neither is there a single sentiment of justice known to human reason or ethics, that would require the refusal of this court to follow the rule of the State court herein presented, and thus cause a policy to be set up in the State of Illinois, different from that uniformly held by a long line of decisions of the highest judicial tribunal of that State. A policy that they have a right to maintain under the constitution and laws of the union, and to have it respected by all who ask for rights under it.

The rule announced in the case of *Knox co. v. Aspinwall*, and adopted in many subsequent cases, furnishes no reason why this court should not adopt the above settled policy in the courts of Illinois. It cannot be said that the defendants in error had a right to rely upon this rule, and say they were not required to look further than to ascertain that an act of the legislature of the State authorizing the issue of these bonds under

any circumstances existed, and that the bonds purported to be issued in pursuance of such act, supposing that they did in this case, because these defendants in error were bound to know, that the application of the rule itself depended upon the law of the State itself, because the rule so asserts as plain as words can express it. And if the State law was settled, that the officer designated to issue the bonds was not the final judge as to whether the law was complied with, but that on the contrary the purchaser was as much required to examine the public records of the town to ascertain whether the law had been complied with, as he was to examine the statutes of the State to see whether the law had been enacted, of course, then, this rule could not apply. Neither can it be contended that this court in construing the enabling act, in order to ascertain whether it did make the officer designated to issue the bonds the final judge as to whether the prerequisites of the law had been complied with, would disregard the construction put upon the statute by the supreme court of the State in that regard, at the time the bonds were issued. That rule was not established by the wisdom of this court for the purpose of over-riding the laws of the several States which this court may be called upon to enforce, but for the purpose of having a regular rule by which to conform to those laws. It was not adopted, and has not been so rigidly adhered to, for the purpose of causing conflict and division between the federal and state courts on the statutes and laws of the several States, thereby

spreading doubt and uncertainty throughout the entire administration of our complex judicial system, but to avoid just such judicial calamity. And, therefore the application of the rule was made to depend upon the enabling statute of the State, and also of course, the construction put upon it by the highest court of the State at the time the bonds were issued. This rule was not intended to assail the rights of the States, but recognizes the principle, that the State may so frame its laws, eithe by legislation or the judicial construction of that legislation, that where its municipal corporations are empowered to issue railroad aid bonds, on certain prescribed conditions, that unless those conditions are performed the bonds shall be void, and where the public records of the municipality disclose the failure to perform those conditions, such disclosure shall be notice to all purchasers of the fact. Then it cannot be held that this rule furnishes a reason why this court should not conform to the State court decisions above quoted in this case, because those decisions, together with the statutes which they construe, embrace just such a policy as last above mentioned. It would be doing violence to the distinguished learning and judgment of the honorable members of this court, to contemplate for a moment that it was designed to give the rule such latitude. Such a view of the rule, would be presuming that this court might enter the judicial domain of the State, and under the pretense of enforcing its statutes and its laws, annihilate those very laws held sacred by its people, and in their stead, set

up other and strange rules with directly opposite operation and effect. Such calamitous conclusions cannot be urged with the least show of reason or justice. They never were contemplated by this court.

(See 62a)

PROPOSITION IV.

Under this proposition it is claimed, as will be seen in Brief (Ante p. 15) that the subscription was made by the supervisor, and received by the company, was made to build an entirely different road from that for which the people voted. The people voted for 51 miles of railroad, with good connections, which would have been a profitable road, but the subscription made by the supervisor, and received by the railroad company, was one 16 miles long, with no profitable connections, and in addition to this, as is shown by fourth plea (P. R. p. 26, *Ante* p. 5.) the Hamilton, Lacon and Eastern railroad never was built, and the bonds, if used at all, were used in building 16 miles of road which was the property of the Chicago and Alton railroad company. Thus the subscription as made by the supervisor, and the enterprise in which it was expended, were each substantially and fundamentally a different enterprise from the enterprise voted for, as specified in the election notice and application, and the people might not have voted for either. For such grounds as these, courts have held bonds void. The case of the *Town of Big Grove vs. Wells*, 65 Ill. 263, is directly in point in this case. There the notice of the election was to take

It may be suggested by counsel, that this court, in Town of Coloma vs Eaves, and perhaps in some other decisions, have already construed a statute of the state of Illinois somewhat similar to the enabling act in this case, and there held that such statute designated the supervisor as the sole tribunal to decide whether the law had been materially followed, and that when he recites in the bonds that it has, the purchaser need not look farther. But in that case it was not cited to this court that the Supreme Court of Illinois had construed said statute, or one parallel thereto, holding that it gave no such power to the supervisor. The question as to how the state court had construed the statute, was not raised, so that this court construed the same, according to its own judgment. Had it then been cited to this court, that that statute, or a statute of similar import, had been construed by the highest judicial tribunal of the state, and had not since been differently construed by said tribunal, or had not been differently construed at the time the bonds therein in question were issued, of course this conrt would have adopted such state court construction; so that Town of Coloma vs Eaves, and those similar thereto, are not authority in the case at bar, as the identical statute involved in the case at bar, has been construed by the Supreme Court of Illinois, in Williams vs the Town of Roberts, *supra*; and in Marshall county vs Cook, *supra*; Schuyler county vs the People, *supra*; Hancock county vs Clark, *supra*, a parallel statute was construed prior to the issue of the bonds in question, fully establishing the principle that the supervisor is not by the enabling act, in this case, "invested with the power to decide whether the condition precedent has been complied with or not, except to govern his own action, the same as any other ministerial officer."

Do not then the above cited decisions furnish a construction of the statute in question in the case at bar, by the highest state court, such as this court cannot

decline to follow, without reversing more than a score of decisions made by this court upon that point? There can be no shadow of doubt that those last named decisions so construe the statute; which statue was similar to the one in question in the case at bar. It is true, that in Marshall county vs Cook, the court discussed some general principles of law, but it was only by way of comparison to aid them in construing their own state statute, and in arriving at what power was invested in the municipal officers by the statute—and declaring that the bonds could not be legally issued, and would be absolutely void in every holder's hands if issued without a material fulfillment of the statute, and that the officers designated to issue the bonds, were not the tribunal to decide the question of fulfillment.

The court in direct conclusion said: (Ante. page 37) "Nor can an election ordered and held without authority of law, be held to answer the requirements of the statute. A legally ordered election is by law, made an essential prerequisite to the exercise of the power, and action by the county authorities without performing such an act is unwarranted." Unwarranted by what? Of course by the statute. If they cannot act without such an election, then by that court's decision they could not decide that an election had been held, when it had not, and on that decision issue valid bonds, as *no act* of the county authorities is warranted by the statute without a legal election.

It is true, that in that case there were no recitals in the bonds, but the court evidently decides that still they would have been bad, had there been recitals that a legal election had been held, when there had been none such, as such action would be unwarranted according to the decision.

Is not then, this a direct construction of the statute by the court? and does not the construction expressly make the statute say that the county authorities desig-

nated to issue the bonds were not invested with power to decide whether the conditions precedent had been complied with or not, and by such decision bind the county if they issued the bonds without such compli ance?

In all candor then I humbly submit whether this court has any alternative but to adopt such constructions, according to the well established rule of this court on judicial comity, no difference what construction your Honors may have given a similar statute of the same state in other cases where the question of state construction was not raised, and such construction must take the case at bar out of the rule of Knox county vs Aspinwall, and hold the bonds in question absolutely void in whosesoever hands they may be found.

Already have several cases been cited where this court have modified their own construction of state statutes to conform with the subsequent construction of such statutes by the highest state court.

Leffingwell vs Warren, 2 Black, 599.

Green vs Neal's Lessee, 6 Pet 291, and other cases.

Also. in St. Joseph Township vs Rogers, 19 Wall. 664, 665, this court decided that it would be competent for the legislature of Illinois to authorize a township to subscribe stock to a railroad company without requiring any preliminary election. This court in that case was not referred to any state court construction on that subject.

Afterward, in the Town of Elmwood vs Marcy, 2 Otto, 289, state court decisions holding that by the constitution of Illinois, the legislature could not authorize a town to make such subscription, without a vote of the people, were referred to this court, such decisions holding that the legislative act legalizing a subscription

made by virtue of a void election was unconstitutional; and this court held themselves bound to adopt such construction, without defending its soundness, and thereby held that the legislature could not authorize a town to subscribe stock to a railroad company without a vote of the people, even though this court had decided that in St. Joseph Township vs Rogers, it was competent for the legislature of that state so to do, thus virtually overuling the decision in St. Joseph vs Rogers, in order to conform with the state court decisions.

It would be utterly subversive of our entire system of jurisprudence to do otherwise. This court can only enforce the local statutes and constitution of a state as the court find them, and not as the court would have them; and this court must also enforce such statutes or constitution as construed by the highest tribunal of the state, and not as the court might construe them, unless such statutes or constitution as so construed, contravene the federal constitution or some federal law or treaty. Such is the unvarying rule of this court, subject to no exception whatever that obtain in this case. (See Post. p 67).

In King vs Wilson 1 Dillon C. C. R. 567, last paragraph, the court by Judge Dillon, in quoting from the cases of Green vs Neal's Lessee; and Leffiingwell vs Warren, wherein this court held that this court would change a former construction of a state statute to conform with a subsequent construction made by the state court, said:

"That the only modification of this principle by the supreme court has been in cases from this state, [Iowa], where contracts were made and rights acquired under former decisions, and when the court, under its power and duty as it supposed, to protect contracts, has declined to follow the later decisions as to prior contracts." The court adds: "That a case involving no contract, or other rights vested under previous decisions, is not within the principle of the exception."

stock and issue bonds to the Eastern Division of the Illinois Grand Trunk Railway, and described it as being formerly known as the "Joliet & Mendota Railway," while the bonds were issued to the Illinois Grand Trunk Railway, thus embracing the whole road. There the court held that this was a different enterprise than that from which the people voted to subscribe to. The court, in concluding its opinion in this case said:

"The people might never have voted as they did if the name of the corporation claiming the bonds had been inserted in the petition and notice, and the result might have been altogether different. It would be a dangerous precedent," the court continues, "to sanction the validity of the bond. The people might then be easily entrapped into an enterprise which was not dreamed of at the time of election. An unfair advantage might readily be taken by calling the attention of the voters to a particular and short division of road, as was done in this case, and then claim the bonds for the construction of an extensive line in which they might never have embarked, and which might not be of the same local benefit."

The same doctrine is set forth in *Fulton co. v. The M. & W. R. R. Co.*, 21 Ill. 369, 373, and by this court in *Marsh v. Fulton Co.*, 10 Wall. 276.

So in this case. Had the proposition been to build

sixteen miles of railroad instead of fifty-one miles, they most probably would have voted down the proposition by a large majority. The enabling act in this case says that the application to the clerk to call the election shall state the conditions of the subscription. Why is this required? To give the people information upon what matters they are called upon to cast their votes, that they may vote intelligently. Did the law then contemplate the idea of not requiring the substantial compliance with the conditions of the application in the subscription of the stock? Did it contemplate the proposition of allowing the people to vote to take stock in a 51 mile railroad with profitable connections, and then compel them to take and pay for stock in a 16 mile road with no profitable connections? Most certainly not. Every dictate of common sense and common honesty would revolt at such law.

PROPOSITION V.

It will probably be contended by counsel for defendants in error that the illegality of the election and subscription made by the Supervisor was cured by the act of the General Assembly of Illinois, entitled "an act supplemental to certain acts of the 26th General Assembly, relating to the Hamilton, Lacon and Eastern Railroad Company, and to confirm the subscription to the capital stock thereof." The first section of the act reads:

"That the election by the stockholders of the Hamilton, Lacon and Eastern Railroad Company is hereby legalized and confirmed, and the officers chosen is hereby declared to be legally constituted officers of said company until their successors are duly elected."

For the second section of said act, so far as pertains here, see *ante* p. 17. But this act is palpably unconstitutional. It is decided so by the Supreme Court of Illinois in *Williams v. The Town of Roberts supra*, and as this decision is printed in full at the close of this argument it is unnecessary to quote any of it here. We respectfully ask this court to give it a careful reading, from which it will be ascertained that the very same principle had been decided by that court in a number of preceeding decisions, all of which have been regarded as binding upon this court in *The Town of Elmwood v. Marcy*, 2 Otto, 289.

It will be seen that the curative act in this case, under the circumstances, is even more objectionable than in the case last mentioned, because in that case, the curative act recites that the majority of the legal votes of the town voted for the subscription. In this case the act says nothing about the election, and the plea shows that a majority of the voters of the town did not vote for the subscription. In that case, the election as to the void bonds, was on the same day and place, when and where, a legal election was held and another subscription was legally voted. The people were there, and a moral, though not legal expression was obtained

on the void subscription. In this case neither a legal nor moral expression of the people was taken, as owing to the light attendance, a majority of the voters did not vote for the subscription, and that we have a right to presume that the reason was on account of the illegality of the call and the want of proper notice. The curative act in this case would be bad even according to the dissenting opinion in *The Town of Elmwood v. Marcy*, as in this case not even the substantial or moral assent of the town was obtained, and also these bonds were purchased by defendants in error the next year after the decisions in the cases of *Marshall et al. v. Silliman*, 61 Ill., 218, and *Wiley et al. v. Silliman et al*, id. 170. Also, in this case, the enablig act substantially says that the Supervisor is not the corporate authority of the township. It says: (See *ante*, p. 11.) "And if a majority of said voters voting at said election, shall be for subscription, then the county court or Board of Supervisors having jurisdiction over county matters, or the corporate authorities of such city, incorporated town, or the Supervisor of such township shall make or cause to be made said subscription," etc., thus clearly recognizing the fact that the supervisor is not the corporate authority of the township. The unconstitutionality of the curative act is partly based upon the fact that the supervisor and town clerk not being the corporate authority of the town, could not be authorized to issue the bonds of the town without a legal vote of the people of the town.

The dissenting opinion claimed that the decisions of the court that the supervisor and town clerk were not the corporate authority of the town, were made after the bonds were purchased by the holders in that case. But here the bonds were purchased after those decisions were made, and the enabling act itself implies that the supervisor, who is in the curative act directed to issue the bonds, is not the corporate authority of the town. This curative act, being the only act that authorized the issue of the bonds in this case, the other act having been disregarded, and the curative being unconstitutional, the bonds still are void in every holders hands. In the *Elmwood* case, *supra.*, this court said: "We are not called upon to vindicate the decisions of the Supreme Court of Illinois in those cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren who agree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the constitution of Illinois. We have always followed the highest court of the State in its *construction of its own constitution and laws.* It is only where they have been construed differently, at different times, that in cases like this, we have adopted as a rule of action the first decision and rejected the last." The court then proceeds to show

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But what difference can this make so far as the state court construction is concerned? The state court holds both curative acts unconstitutional, and point out the particular part of the constitution they violate, hence, in each case a construction of the state constitution is presented so that the case of Elmwood v. Marcy applies just as well to the case at bar as the case therein decided, because the case of Williams v. the Town of Roberts, involves a a state court construction just as binding upon this court, as the state cases cited and followed in Elmwood v. Marcy. This matter of the difference between the two elections and subscriptions attempted to be cured in the two instances, is discussed by the Illinois Supreme Court in Williams v. the Town of Roberts. (See the words marked on third page of the decision, printed in the back part of this pamphlet.)

on the void subscription. In this case neither a legal nor moral expression of the people was taken, as owing to the light attendance, a majority of the voters did not vote for the subscription, and that we have a right to presume that the reason was on account of the illegality of the call and the want of proper notice. The curative act in this case would be bad even according to the dissenting opinion in *The Town of Elmwood v. Marcy*, as in this case not even the substantial or moral assent of the town was obtained, and also these bonds were purchased by defendants in error the next year after the decisions in the cases of *Marshall et al. v. Silliman*, 61 Ill, 218, and *Wiley et al. v. Silliman et al*, id. 170. Also, in this case, the enablig act substantially says that the Supervisor is not the corporate authority of the township. It says: (See *ante*, p. 11.) "And if a majority of said voters voting at said election, shall be for subscription, then the county court or Board of Supervisors having jurisdiction over county matters, or the corporate authorities of such city, incorporated town, or the Supervisor of such township shall make or cause to be made said subscription," etc., thus clearly recognizing the fact that the supervisor is not the corporate authority of the township. The unconstitutionality of the curative act is partly based upon the fact that the supervisor and town clerk not being the corporate authority of the town, could not be authorized to issue the bonds of the town without a legal vote of the people of the town.

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But what difference can this make so far as the state court construction is concerned? The state court holds both curative acts unconstitutional, and point out the particular part of the constitution they violate, hence, in each case a construction of the state constitution is presented so that the case of Elmwood v. Marcy applies just as well to the case at bar as the case therein decided, because the case of Williams v. the Town of Roberts, involves a a state court construction just as binding upon this court, as the state cases cited and followed in Elmwood v. Marcy. This matter of the difference between the two elections and subscriptions attempted to be cured in the two instances, is discussed by the Illinois Supreme Court in Williams v. the Town of Roberts. (See the words marked on third page of the decision, printed in the back part of this pamphlet.)

that settled uniformity has been the rule in the State court on this question.

PROPOSITION VI.

The Curative act notice to purchasers of the illegality of the subscription.—I now come to discuss the last, but by no means the least important Proposition presented in this Brief. (*Ante p.* 17.) The points raised under this Proposition alone, in connection with the facts stated in third plea, are certainly absolutely sufficient to defeat a recovery on these bonds and coupons. They annihilate every possible claim made by defendants in error of being *bona fide* holders, and incontrovertibly establish the fact that they had legal notice by the face of the bonds and the acts of the General Assembly of Illinois therein referred to, of all the illegalities with which the bonds are tainted.

The bonds recite that they are issued in pursuance of the laws of Illinois, in payment of a subscription for railroad stock made by virtue of a vote of said town, held in pursuance of the provisions of the laws and acts of the General Assembly of Illinois, incorporating the Hamilton, Lacon and Eastern railroad company. The purchaser is then referred by the bonds to said acts. When examined, one of them, entitled "an act supplemental to certain acts of the 26th General Assembly, relating to the Hamilton, Lacon and Eastern Railroad Company, and to legalize the organization of said company, and to confirm the subscriptions to the capital stock thereof" names this subscription of thirty thousand

dollars to the Hamilton, Lacon and Eastern Railroad Company by name, and declares that the same shall be legal and binding upon the town, and that the Supervisor *shall* issue the bonds in pursuance of the terms of said subscription. [See *ante*, pp. 17, 54.] Was this not notice to the purchaser that the proceedings up to that time had been illegal and void? Why legalize if not illegal? Why validate if not invalid? Why declare the subscription binding upon the town if it was binding before? Did any purchaser have a right to presume that that subscription was legal and valid when made, after reading said act? One of the acts to which he was specially referred to by the face of the bonds! Did not that act disclose enough facts to the purchaser to put him upon his inquiry as to what that illegality was? Can any purchaser in the face of this act, contend that he is a holder in good faith, without notice of the illegality of the election as set up in third plea? Would it be good faitn for him to shut his eyes against the fact that the legislature had recognized the subscription as illegal, in an act to which the face of the bonds referred, and then say, through a demurrer to a plea setting up that illegality, that he did not have notice thereof? Can the Honorable members of this court, with all their legal learning, and with that extensive experience with the business transactions of men, which long years of active service in the greatest and most important judicial tribunal of the civilized world must furnish, decide that good faith is composed of

holder of the paper is not one in good faith as to such illegalities, the discovery of which the inquiry suggested by the facts and circumstances disclosed, would lead to.

Suppose now, for the sake of the argument that this case was not, by the peculiar statute of Illinois and the constructions given them, taken out of the rule announced in *Knox county v. Aspinwall*, the bonds would still be void as against any one. Here the supervisor issued the bonds, and recites that they are issued in pursuance to the laws of Illinois, does not name the enabling act, and recites that the subscription was made by virtue of an election held in pursuance to the laws and the several acts of the General Assembly of Illinois, incorporating said railroad company. Those acts became a part of the recital of the bonds, so far as they apply to this particular case. And one of the acts referred to, we find singles out the very subscription mentioned in the bonds, and proceeds to legalize it, thus recognizing it as illegal. This explains why the supervisor does not mention the enabling act by name, in his recitals, as the recitals in bonds generally do, and say that it had been complied with, or say that the bonds are issued in pursuance to the enabling law. The supervisor virtually says that the enabling act was not complied with, by referring the purchaser, by his recitals to an act of the legislature that gave notice that the enabling statute were not complied with, in making the subscription, and that it

was therefore illegal, and the act attempted to legalize it. So that even should we admit, (which is not the law) that the supervisor was the judge to make the decision as to whether the enabling statute had been complied with, when he proceeded to pass upon the question in the issue of these bonds, the purchaser finds that the substance of his recitals is, when taken in connection with the legislative acts to which he refers, that the enabling act was not pursued in making the subscription, but that the subscription was presumed to be legalized by the legislature, and that by virtue of that act, and not the original enabling act of March 5th, 1869, the bonds were issued; and the purchaser was thus notified by the face of the bonds an their directions, that the only authority for the issue was the so-called legalizing act, and that from the facts and circumstances thus disclosed to him, he could not, in good faith, depend upon any other conclusion. Of course, if it should have been afterwards discovered from facts in *pais* that the legislature was mistaken in regarding the subscription as illegal, and in fact the enabling act was pursued, then the purchaser would be permitted to take advantage of the situation. But he had no right to *presume* that the legislature was mistaken, as the *bona fide* presumptions would be all the other way, and when it is ascertained that the legislature was correct, then the purchaser is bound by the notice it had given him, because he was put upon his inquiry in apt time.

In McClure vs Township of Oxford, 4 Otto, 432 this court Said:—"Every "man is chargeable with notice of that which the law requires him to know, and "OF WHICH, AFTER BEING PUT UPON INQUIRY, he might have "ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, "which upon their face refer to the Statutes under which they were issued, is bound "to take notice of the Statute and of all its requirements." By the same reasoning the court would say that the purchaser would be bound to take notice of whatever information any act referred to in the bonds would give as to the validity of the subscription when made, and in attempting to legalize the Subscription, the act would be virtually giving information that it was illegal.

Further, the enabling act was approved on the 5th day of March, 1869. The election was held on the 25th of that same month. The notice should have been posted up on the very day the act became a law to give the requisite twenty days notice. How improbable for the purchaser to suppose that the text of the law was received, or even its import, and the applica- of twenty four voters and taxpayers procured, and the the notices posted up all on that day; so that, when the legalizing act is read, how easy, how natural to presume, that the election was held without reference to the law, as it in fact was, and therefore illegal; hence the legalizing act. How unnatural and impossible to arrive at any other conclusion.

View this matter from every reasonable standpoint imaginable, and no logical deduction can be made therefrom, other than that the purchaser had ample notice from the face of the bonds and matters to which they referred, of the illegalities alleged in third plea below, and that he needed no other notice; and that from the face of the bonds he could not, in good faith, under the light of the circumstances disclosed to him, depend upon any law as authority for the issue of the bonds, except the so-called legalizing act, as that act gave notice that all other laws had been disregarded. Such then was the only law authorizing the issue of the bonds, and therefore their validity depended entirely upon the validity of the legalizing act. This conclusion is irresistible! It is in such

entire consonance with all the logic of circumstances that it cannot be avoided. The legalizing act, at first blush, must say to every rational mind, that the proceedings in regard to the subscription prior to the passage of the act were illegal. It would be suggestive of that fact to the most ordinary mind. No other presumption could be indulged. It is a solemn admonition in a public way, to every purchaser to depend upon no prior proceeding in regard to the subscription, or the issue of the bonds.

But as we have seen, the legalizing act is unconstitutional, as the purchaser might have ascertained, had he examined the decisions of the State courts of Illinois at that time, and therefore the bonds were issued without authority of law and were absolutely void in every holders hands. (Ante p. 67).

CONCLUSION.

This argument has reached a considerable length, though I hope not burdensome to YOUR HONORS. I have felt unable to present such matters as I have deemed highly important in less space. And in conclusion, it appears to me, that the points and arguments presented, utterly annihilate the validity of these bonds in every holder's hands; and also, even if they were valid instruments, the legal title to them is not in the defendants in error, but in the Hamilton, Lacon and Eastern railroad company. The entire case may be summed up thus:

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I. The first plea of defendant below is good, because no bond, by the peculiar statute of Illinois, as construed by its highest judicial tribunal, can be anywhere transferred, except by endorsement in writing, so as to enable the holder to sue in his own name in Illinois, and such statute as construed is binding upon this court by all its decisions rendered upon the subject. Demurrer ought to have been overruled as to the first plea, and the bonds under the special findings of the court ought to have been excluded. *Ante* pp. 19-27.

II. Third plea presented a complete defense, showing that the material requirements of the law were not complied with, thus making the election a nullity, and by the construction of the enabling act made by the highest court of the State of Illinois before and after the bonds were issued, the Supervisor was not invested with power to decide whether the law was materially followed in issuing the bonds, that by this construction defendants in error were charged by the law with notice of the illegalities set up in the plea, as by the law and decisions thereon he must seek information of the public records of the town as to those matters, where he would have been informed of the illegality of the election.

Secondly, the third plea is good because it sets up facts, taken in connection with the enabling statute, showing that the bonds were such in character as had been uniformly held by the Supreme Court of Illinois to be void "in whosesoever hands they may be found," that

their infirmities were such that might, with reasonable diligence have been discovered by the purchasers, that those decisions became a part of those contracts at the time the latter were made, and binding upon this court. *Ante* 52-55.

And lastly, and most clearly, the third plea is good, because, independent of all the above considerations, the curative act, [Ante pp. 65, 17,] gave notice to defendants in error that the subscription was illegal; they could not presume that the enabling act had been followed, but could only presume that it had been disregarded, and that the bonds depended alone upon the curative act for their validity, and that act being in violation of the constitution of the State, as construed by the Supreme Court of Illinois at the time the bonds were purchased, they were bound to know that the bonds were void in their hands. Demurrer as to third plea should have been overruled by the court below.

III. The fourth plea shows that the subscription was not made in pursuance to the terms of the application and notice of election, and that it was not used in constructing the road voted for, but to a road belonging to another corporation, that even had the election been legal the subscription was void, and the bonds used, if at all in a road not belonging to the company to whom the subscription was made, that the town received nothing thereby for its bonds, and should they be held

valid, it would be oppressing the people with taxes and not a dollar received by them therefor. These facts, taken into connection with the notice given by the curative act, and its unconstitutionality, makes the plea good. (See Plea *ante* pp. 5-7.

These points, and most especially those embracing the first and third pleas, are clearly supported by an array of authority that cannot be successfully controverted, as well as being in perfect consonance with the highest principles of justice that it is possible for human reason to conceive. The defendants in error base their claims entirely upon having been ignorant of the infirmities with which the bonds were inflicted. But we have seen that this claim has been utterly annihilated by the facts which they admit by their demurrer to be true, taken in connection with the statute and decisions that apply in this case, together with the unconstitutional curative act, and the notice it gives; all considered in accordance with the best known rules of justice between men and men. A stronger case need not be presented than this, where the law and the facts disclosed by the bonds and their references, charge the purchaser with knowledge of the infirmities of the paper purchased, and it would be a grievous wrong to the people of the town of Roberts to compel them to pay these bonds and coupons, especially to those who with reasonable diligence might have discovered their invalidity. In consideration of all the matters in this brief

and argument set forth, the plaintiff in error asks that the judgment below be reversed.

Respectfully submitted,

A. J. BELL,

Attorney for Plaintiff in Error.

Decision of the Illinois Supreme Court,

ON THE VALIDITY OF THE

ROBERTS TOWN R. R. BONDS.

The following is a decision rendered by the Supreme Court of this State on the validity of the Roberts Town Railroad Bonds, issued in 1871 :

Opinion of the Court.

State of Illinois, Supreme Court, Central Grand Division, at a Supreme Court, begun and held for the Central Grand Division of the State of Illinois, at Springfield, on the first Tuesday after the first Monday in January, A. D. 1878.

PRESENT.

John Schofield, Chief Justice; Sidney Breese, B. R. Sheldon, T. Lyle Dickey, John M. Scott, Alfred M. Craig, Pinkney H. Walker, Justices.

To-wit: On the 24th day of June, A. D. 1878, there was filed in the office of the Clerk of said Court an opinion of said Court, in the words and figures following:

Charles G. Williams v. The Town of Roberts. Appeal from Marshall.

Opinion of the Court by Chief Justice Schofield :

This Court has repeatedly announced the doctrine that when a municipality is empowered to subscribe to the capital stock of a railroad company and issue its bonds in payment of its subscription, but it is also required that there shall first be an affirmative vote of a majority of the electors of the municipality to that effect, no power exists to make the subscription, and issue the bonds, until after such vote shall have been obtained, at an election held for that purpose, called by the authority prescribed by the law, and upon such notice of the time and place of holding the election as the law shall direct, and that whoever deals in municipal bonds is chargeable with knowledge whether these precedent conditions to the existence of the power of making the subscription and issuing the bonds have been complied with. *Marshall County* v. *Cook*, 38 Ill. 48; *People ex. rel., etc.* v. *Supervisors of Logan County*, 63 Ill. 384; *Harding* v. *R. R. I. & St. L. R. R. Co.*, 65 Ib. 90; *Middleport* v. *Etna Ins. Co.*, 82 Ib. 562.

The first section of the act of March 6th, 1867, (Private laws of 1867, vol. 1, p. 866), under the provisions of which it is claimed the bond in controversy was issued, requires there shall first be an affirmative vote of a majority of the electors of the town authorizing the subscription; that the election should be called upon the application of twenty-four legal voters and tax-payers of the towns, and that notice of the election

shall be posted for at least twenty days. The pleas show that the application for the election was signed by only twelve legal voters and tax-payers of the town, and that the notice of the election was posted only ten days. Under the ruling referred to, therefore, it must follow, the election was a nullity, and no power existed in the supervisor of the town to make the subscription and issue the bonds.

But it is contended that, conceding this to be true, the subscription and issue of the bonds were made valid by a curative act of the legislature in force April 17th, 1869, (private laws of 1869, vol. 3, p. 302.) The section of that act does assume to have that effect. It refers to the subscription by name and declares that it shall be valid and binding; and therefore if it was within legislative competency thus to bind the town, that settles the objection to the bonds.

County boards, such as boards of supervisors, county commissioners, etc., and the municipal authorities of incorporated cities, towns and villages may, when empowered so to do by proper legislation, subscribe for the capital stock of railroad corporations without first submitting the question to the electors of the municipality. They are elected as representatives of the electors, and theoretically, in appropriate cases, their acts are the acts of those they represent. Hence it has been held, where a vote of the electors has been required as a precedent condition to the making of a subscription for stock in a railroad company, and the law prescribing the mode of calling and holding the election has not been observed, inasmuch as the legislature might have empowered the municipal authorities to make the subscription, without first submitting the question to the electors, it may, by a subsequent enactment, declare that non-compliance with the law in the holding of the election of no consequence, and validate the subscription. In other words, validate the subscription without reference to the election. This, however, it will be observed, is upon the theory that power to make the subscription does not, in any degree, necessarily depend upon a vote of the electors of the municipality upon the question, but solely upon the will of the legislature. But under our system of township organization, there is no officer, or board representing the corporate authority of the town. The electors only represent it, and they, in doing so, must and do necessarily act through town meetings, or town elections, and it is not pretended they may or did, in the present instance bind the town in any other way. The doctrine has been announced and adhered to by this court for a number of years, and is engrafted upon our present constitution, that the legislature cannot compel a municipal corporation to incur a debt, or issue its bonds for a local corporate purpose without its consent. *Hesler* v. *Drainage Comms.*, 53 Ills. 110; *Livingstone* v. *Wider*, Ib. 302. The municipality may be invested with power by the legislature to that end, and incur its debt through its corporate authority; but the legislature is not authorized to create such debt for it or compel its corporate authority to do so. Here then, the only pretense

that the corporate authority of the town (electors) acted, in making this subscription and issuing the bonds, in the pretended election. But it was not called in conformity with law, and the notice of the election was not given that the law required. Of this, it is to be presumed, the electors were cognizant; and, being advised of its illegality, it is fair to presume that many opposed to the proposition pretended to be submitted, did not participate in the election, knowing that they could not possibly be affected by it. The election being illegal and void, it is impossible to say that in any such view the result can be regarded as the assent of the corporate authority of the town to the proposition submitted. The corporate authority of the town (the electors) must and can act when called together in obedience to law, and when not thus called together, it is obvious any action by them can at best, amount to no more than the action of a mass meeting. The supervisor and town clerk, neither separately nor associately, are the corporate authority of the town. They are simply town officers with limited duties, to perform in respect to town affairs, whom the law have appointed to discharge a ministerial duty in obedience to the action of the town authority. They possessed no power, either as town officers, or under the statute, except under the direction of the corporate authority of the town, to do any act in regard to making the subscription, or issuing the bonds. The act of April 17th 1869, then rests solely on the power of the legislature to create a debt, against the town with the consent of the corporate authoraty. That the consent had not been given anterior to the passage of the act—it was not required, nor has it been given posterior to its passage—and hence, upon the authority of the cases referred to, it was invalid because beyond legislative competency. This question was fully considered and discussed in *Marshall* v. *Silliman, Supra, and Wiley et. at.* vs. *Silliman* 62, *Ill.*, 170, and what we have said goes but little beyond a re-statement of the proposition then carefully elaborated. It is true, in those cases, the subscription condemned had not been authorized by the corporate authority of the town, although an election for that purpose was claimed to have been held, because no law authorized an election for that purpose,—but the difference between a pretended election held to be a nullity because not authorized by any law, and one held to be a nullity because not called and held in obedience to an existing law, can surely be of no significance to the present question. The result is, in neither case was there any action of the corporate authority of the town (the electors) on the question, which the law will recognize, and in both cases the legality of the subscription and issue of the bonds must rest solely upon the act which assumes to validate them. See *Barnes* v. *Town of Lacon*, 81 *Ill*, 461.

In our opinion, the case presents a question, not of the mere defective execution of a power in issuing bonds—but of an entire absence of power in those assuming to be the representatives of the town to act in

the matter; and thus holding, the judgment below meets with our approval and must be affirmed.

We are aware that a rule differing in material respects from that followed by this court in regard to the extent to which *bona fide* holders of municipal bonds shall be protected by the recital of those invested with the ministerial duty of issuing such bonds, is held by the supreme court of the United States, but much as we respect the ability and learning of the members of that court by whom that rule is maintained, we have never been convinced that it is preferable to that we have adhered to. The agent cannot in our opinion by his act alone, invest himself with power to bind his principal, and his individual act unknown to and un-sanctioned by his principal, cannot be held to estop his principal to deny his power to act. As we have seen, a town must act through its electors, either to ratify an act already done, or to authorize a future act, when its acquiescence or consent is material, and there having been, here, no such act, there cannot be no estoppel.

Affirmed.

[ADDITIONAL.]

Argument of Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A D 1879.

No. 146.

TOWN OF ROBERTS, PLAINTIFF IN ERROR.

vs.

MATTHEW BOLLES AND M. SHEPPARD BOLLES, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

A. J. BELL, PEORIA, ILLINOIS,
Attorney for Plaintiff in Error.

Filed....., *A. D*.....

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Clerk U. S. Court.

United States of America.

IN THE SUPREME COURT.

OCTOBER TERM, A. D. 1879.

TOWN OF ROBERTS, *Plaintiff in Error*,

vs.

MATTHEW BOLLES and M. SHEPPARD BOLLES, Partners, Etc., *Defendants in error*.

ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR.

After examining the brief and argument of defendant in error on file in this case, I ask permission, as I have the affirmative to make to trespass a few moments longer upon your time.

I.

As to the questions of the legal title of the bonds.

The position taken by counsel, that the Illinois decisions (17th Ill., 450 and 3d Scamm., 385), are constructions of the contract is certainly untenable in the extreme. To read what the Court says, as quoted in my brief page 20, last paragraph, and on page 21 will at once dissipate any such idea. True the Court say the words or bearer are surplusage, but this only means so far as the statute is concerned. There was no dispute as to the meaning of the ~~statute~~ contract. That was plain enough. The Court decided that though the intention of the contract indicated that it might be transferred by delivery, the statute required a written endorsement to transfer the legal title.

2. The authorities cited by counsel to show that by the common or general commercial law, municipal bonds payable to A. or bearer are transferable by mere delivery are manifestly not in point. The statute of Illinois says that notes, *bonds*, etc., shall be transferred by endorsement in writing, and the highest judicial tribunal of the State says: "The statute declares how "such notes shall be transferred, which necessarily "excludes all other modes of transfer." The statute thus supersedes the common, or commercial law on the subject, which it has the right to do, especially to the control of domestic paper, which the bonds in this case are, so that it can be of no moment in this case as to what is the general commercial law on that subject; as by the peculiar local statute of Illinois as construed by the highest State Court, the bonds in question are only transferable by endorsement in writing, and such stat-

ute, as so construed, constitue the rule of decision for this Court.

3. But counsel seeks to escape this conclusion, by urging that Illinois decisions take municipal bonds out of the purview of the statute on negotiable instruments. The only case which he cites that even squints that way, is *Johnson v. Stark Co.*, 24 Ill., 93. But a careful examination of that case will discover the fact that it by no means does so. The question as decided in that case, was in regard to the coupon and not the bonds, and the bonds in that case, which had a specified payee were endorsed in writing. The coupon had no specified payee. The question decided is, that the coupon, having no specified payee, was necessarily transferable by delivery. It is true, that the Court in commenting on the case in a general way, spoke about a doctrine that, "*state, county, city and other bonds* are "negotiable by delivery without endorsement, but it "immediately qualified the statement, by adding, es- "pecially when they are made *payable to bearer*," meaning, of course, payable to bearer without any specified payee. All the other Illinois decisions cited by counsel on this point, refer simply to coupons payable to bearer alone, and I submit that they all, if anything, lead to the inference that it is because no specified payee is named. The town of *Eagle v. Kohn*, cited by counsel says that municipal bonds are commercial paper [so are promissory notes], and adds, "this Court has held *coupons* attached to them to be negotiable by delivery only, without indorsement."

clearly inferring that the bonds were not, and certainly indicating that the case of *Johnson v. Stark Co.* did not take the bonds themselves, with a specified payee, out of the statute on negotiable instruments. *Supervisors of Mercer Co. v. Hubbard*, 45 Ill., only takes the coupons out of the statute, and by direct inference causes the bonds to be treated as promissory notes, etc., and takes the coupons out solely because they have no specified payee and are made payable to bearer alone.

4.—Counsel quotes the statute in another section, passed since the decisions upon which we rely were made, and which makes notes, bonds and other instruments payable to bearer alone, transferable by delivery. I see no significance that that can have, except that it shows that the Legislature was perfectly well satisfied with the construction given to the other section, as otherwise that important body would have interfered with the Supreme Court's ruling, and declared that notes, bonds, etc., payable to some payee or bearer should also be made transferable by delivery. As it is, it is a sort of legislative construction of the former section in conformity with that of the Supreme Court.

Under all these circumstances it certainly cannot be held, with any show of reason, that the case of *Johnson v. Stark Co.* takes these bonds out of the statute, especially when the question decided was only in reference to a coupon without a specified payee, and when, too, the Court said just preceding the words quoted by counsel: "The bond to which it [the coupon] was annexed was duly assigned to plaintiff

but there was no endorsement upon the coupon." Counsel urges that when the Legislature of Illinois authorized the defendant corporation to vote said bonds, the legislative intent referred to bonds which should pass by manual delivery. Certainly the legislative intent was just the contrary. When the authorizing statute was enacted, the statute provided that any *bond* made by any body politic (see my original argument, page 25, 13th line, etc), was transferable in writing, and the Supreme Court had decided that such statute excluded all other modes of transfer of such instruments wherein a specified payee was named, and the Legislature knowing the law of their State, unquestionably intended that they should be subject to such statute.

In 3d Bradwell, p. 329, Appellate Court Reports, Ill., at Feb. Term, 1879, Raberman v. Muelhausen, the Court said: "The note is payable to O. P. Baker or "bearer, and was passed to the appellee by delivery. "Under sec. 4, chap. 28, R. S. 1874, promissory notes "must be indorsed thereon under the hand of the payee "in order to vest the right of property absolutely in "the assignee." Said section 4 is the same one herein under discussion.

5. Counsel cites several decisions of this court where it has been held that bonds payable to a specified payee or bearer, are transferable by delivery without endorsement, some of which cases involved Illinois bonds, but none of those cases are in point here, as the

question of the state statute and the construction thereof by the state court was not raised in any of those cases, and in fact in most, if not all of them constitute suits on coupons alone.

II.

AS TO THIRD PLEA.

1. Counsel contends that the third plea is bad because it does not allege specifically constructive notice to *bona fide* purchasers from whom plaintiff purchased. In pleading constructive notice it is necessary and only necessary to plead facts amounting in law to construct ive notice. If the facts pleaded in third plea amount to constructive notice at all in this case, then they constitute constructive notice to all the world, and the pleading of the necessary facts contitute an averment of such notice, and the specific allegation in direct words, charging constructive notice was a mere conclusion of law and surplusage, so that the omission by the pleader below to include said *bone fide* purchasers in such specific allegations has no significance. Counsel himself contends that this special allegation "was only used to refer to the presence of the designated papers in the town clerk's office as the notice meant" and if the presence of those papers constituted notice to anybody, they constituted notice to all purchasers whatever.

2. Then comes the question whether the town have the right in this case to contradict the recitals in

the bonds as to purchasers for value before maturity who had no actual notice of the illegality of the election. I freely admit that, independent of the question of state court construction, this question has been settled by this court in cases very similar to this beyond all debate, cavil or dispute. But the court will remember that my position is, that all those decisions holding that the purchaser need not look further than the law authorizing the municipality to subscribe, rest upon the expressed condition in every case that the enabling statute invests the officer designated to issue the bonds as the final judge as to whether the law has been materially followed. If the statute does so invest the said officer, then his recitals in the bonds that the law has been followed, could not be contradicted by the town, but that if the law does not so invest said officer, then the town is not estopped from contradicting such recitals, as such recitals would be unwarranted if not true, and hence not binding upon the town. That therefore a construction of the enabling act is involved, that the enabling act in the case at bar, and similar enabling statutes of the same state have been construed by the highest judicial tribunal of the state holding that the supervisor nor town clerk were so invested; and that it is the uniform rule of this court to adhere to the construction given to state statutes by the highest court of such state, except in a few instances which I fully examined in original brief and argument, and as I submit, fully showing that they do not apply in this case.

Now then, after having carefully examined opposite counsel's brief and argument, I fail to see wherein

he has in any degree whatever shaken my position. Counsel at once realizes the potency of the argument that the question of contradicting the recitals of the bonds depends upon the fact whether the law makes the supervisor and town clerk the final judge, etc., and in both his brief and argument says: (see p. 42) "it can be gathered from these acts that it evidently belonged to him (meaning the supervisor) or town clerk to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription." To sustain such a construction of the statute he cites several decisions of this court. He quotes largely from *The Town of Colona v. Eaves* 72 U. S. 488, *Humboldt Township v. Long* 92 U. S 644, and cites *St. Joseph Township v Rogers* 16 Wallace 644, wherein similar statutes to the one in question were construed so as to invest the officers designated to issue the bonds with power to decide once for all that the law had been complied with. But in not one of those cases cited by counsel was the question raised as to how the state court had construed the statute or a similar one thereto. How then, I ask in all candor, can those cases be in point, now that the question of state court construction is raised, if there be state court decisions cited clearly declaring that the statute does not invest the supervisor and town clerk with the power above referred to? Counsel no where in his brief contests the position taken that the Supreme Court of Illinois has decided that this statute and other statutes similar to this do not make the supervisor and town clerk the final judge as to whether the election had

been properly held or not. If then, the Supreme Court of Illinois have firmly settled the construction of those statutes and the enabling statutes in this case, construing that they do not make said officers the final judge as to whether the election was legally held or not, and have not construed them otherwise prior to the issue of these bonds so as to mislead purchasers, then that construction becomes the rule of decision to be adopted by this court, irrespective of what this court may have decided in cases where the question of state court construction was not raised. (See cases cited in original brief p. 12, and which I think I have fully examined in my my original argument.) The moment, then, that the enabling act in question is construed so as not to invest the supervisor and town clerk or either of them with power to finally determine and recite whether the election was legally held or not, then those recitals can be contradicted by the town, if they be untrue, as against any purchasers as, the recitals would be unwarranted and not of authority, and the matters set up in third plea, showing the election to be illegal and void, at once become competent matters to plead, and arrays the third plea upon the record of this ease as a good one, and makes it error in the court below in sustaining a demurrer thereto.

Counsel insists that section 5, of the act of March 6, 1867, which says: It is further enacted that no mistake in the notice etc., shall invalidate etc., cures the illegalities of the election. But that statute was passed upon by the Supreme Court of Illinois in *Wil-*

liams v. The Town of Roberts, wherein this question was raised, in which case the bonds were held bad. I append to the back part of this argument a folio from the brief and argument to the Supreme Court of Illinois in the above case, to which I refer this Court, on that question, and I further submit that the construction of the Court in that case as to the meaning of the said statute is binding upon this Court.

III.

The reply of counsel to proposition VI. of my brief, p. 68, in most part only fortifies my position, and none of said reply, when examined, breaks the force of the argument of said proposition. He says purchasers are not referred to the curative act of April 17, by the face of the bonds. Now the bonds do not refer to any act by name, but refer to the "several acts "of the General Assembly of the State of Illinois in- "corporating said railroad company." Is the purchaser not referred to every several act of the General Assembly pertaining to the incorporation of said railroad company? The act of April 17, is entitled, "An "act supplemental to certain acts of the 26th General "Assembly relating to the Hamilton, Lacon and Eastern "railroad company, and to confirm the subscriptions to "the capital stock thereof." For section 1 see page 65 of my brief, and for second section see p. 17, this act is as much an act incorporating said railroad company as that of March 5th, and the former is certainly referred to in those recitals, and all purchasers were bound to

take notice of it. But counsel urges that if the act is void then purchasers were not required to seek for it. But it was an act pertaining to the incorporation of the said railroad company nevertheless, and the whole act is not declared void, but only so much as pertains to the legalizing of the railroad subscriptions. Further, it is a public act of the Legislature, published as one of the recognized acts of the Legislature, and even if it were not referred to in the bonds as it is, everybody are bound to take notice of its contents. But attention being called to it by the face of the bonds, purchasers are doubly required to take notice of it.

IV.

Counsel says the State Court in *Williams v. Town of Roberts*, ignores the effect of the recitals in the bonds, and admits that it is not in harmony with the Supreme Court of the United States, and says this court ought not therefore to follow the said decisions in face of the authorities which he cites on page 56 of his brief. The state court simply decides that the statute does not constitute the supervisor or town clerk as the final judge of the matters they recite, hence it ignores their recitals, the same as this court would do under such a construction of the statute, according to the very decisions cited by counsel. The state court only differs with this court and only acknowledges that it differs with it in the construction of the statute. And on this question this court has times without number decided as I have shown in my brief that it will

follow the state court wherever the state court decision is brought to the court's attention. In *Fairfield v. County of Gallatin*, this court, by Justice Strong, delivered an elaborate opinion declarative of this principle. In the cases cited by counsel the state court decisions were not brought to the court's notice.

Counsel contends that the curative act in this case is valid, and that the decision of *Elmwood v. Marcy* does not apply, but I think I anticipated all the points he has made and fully answered them in my original brief. In each case a construction of the constition of Illinois is involved, and there is no reason why in each case alike this court is not concluded by the state court. The same reply may be properly made to what he says of the other Illinois decisions I have cited.

Counsel says these bonds were purchased relying upon the decisions of this court, which he has cited, holding Illinois bonds good. If purchasers examined these decisions, and they could not rely upon them unless they did, they saw that the state court construction of the respective enabling acts had not been raised, that the validity of the bonds solely depended upon the construction of said statutes, and they were bound to know that this question must some time be raised, and therefore they bought at their peril, especially when these bonds were put upon the market the Illinois court had construed such statutes so as to give no force to such recitals as are contained in these bonds.

Many points made by counsel in his brief have been anticipated in my original brief and there considered, of which I can only ask a fair consideration, and in conclusion then, I still humbly submit, that there has been no law or decision cited, nor any reasonable deductions presented in the argument of this case, that would make it the duty of this Court to hold these bonds good which are held void by the State Court, thus furnishing two rules of property in the same State with all their concomitant evils.

Respectfully submitted,

A. J. BELL,

Attorney for Plaintiff.

POINT IV.

What mistakes, if any, are cured by the 5th section of the act of 1867.

I do not deem it necessary to dwell long on this point. The 5th section of the act of March 6, 1867, Private Laws, volume 7, page 868, says: "No mistake in the giving of the notice, or in the canvass, or returns of votes, or in the issuing of the bonds, shall not in any way invalidate said bonds, so issued, provided there is a majority of the voters at such election in favor of subscription."

Counsel for appellant claims that this cures all the failures of compliance with the terms of said law. But this claim is emphatically untenable. In the first place I might insist that as the above section involves a double negative, therefore, strictly speaking, it declares that no mistake shall not invalidate, but some or any mistake shall.

The words, "no mistake in giving the notice," cannot refer to the length of time the notice shall be posted up. It would not be a reasonable or fair construction of this section to say that the legislature in one section would positively require that the clerk should post up the notice *at least* twenty days, and then in another section say that it would be no difference whether he did or not. Such construction would be the worst of sophistry. Appellee does not claim that there was any mistake in giving the notice, but that the notice, as required by the laws, was not given at all. The first section of the act says that twenty days' notice must be

given, and anything less than that is no notice at all. When the 5th section says that "no mistake in giving the notice," etc., it substantially says no mistake in giving the twenty days' notice, etc. But the defense in the plea is not that there was a mistake in giving the notice, but that the notice was not given at all, as is required by the statute. Had there been some mistake in the body of the notice of some immaterial matter, under this section, that might have been cured, provided it should be proven that it was a mistake. But the lack of requirement of which we complain was not a mistake. It was just as the clerk intended, and it was a failure to give the notice required by law. And further, this would not reach the application at any rate, and this is an evidence that the legislature did not mean by this section to dispense with any of the requirements calculating to give notice to the people of the time the election should be held. The statute clearly means that the application should be made as required by the terms of the statute, and that the notice should be posted up at least 20 days. Another evidence of this fact is, that the section says, that no mistake, etc., shall invalidate, etc., "*provided*, that there is a majority of the voters at such election in favor of subscription." That provision should be no reason for excusing the lack of twenty days' notice, because the less number of days' notice there should be given, the more likelihood there would be of a majority of the voters *at the election* being in favor of subscription, as naturally those agitating the question would be in favor of the proposition, and they would be there, and should the others not hear

of the election on account of such small number of days' notice being given, the affirmative of the question would not be so likely to have opposition. Thus the provisions in the section dispel all idea that the failure to post up the notices for the sufficient number of days should be cured. Had the provision said "provided a majority of *all the voters in the township* should be shown by the election to be in favor of the subscription, then there might be some little sense in claiming that the section applied to the number of days notice. If it should be as appellant claims, then the law would mean this: That the town clerk shall give twenty days' notice, that the people may have an opportunity of learning of the election that no snap judgment may be taken on them. But then, if he neglect this requirement, and only give one or two days' notice, and thereby enable a few designing persons to semi-secretly hold an election and vote one hundred thousand dollars of stock upon the town, such failure to comply with the law shall not invalidate the bonds, provided that a majority of the designing few fellows who had spirited themselves to the polls, as it were, shall be in favor of subscription. Such a construction of the statute would be an insult to common sense, and could not be contemplated by a court of justice and wisdom for a single moment.

POINT V.

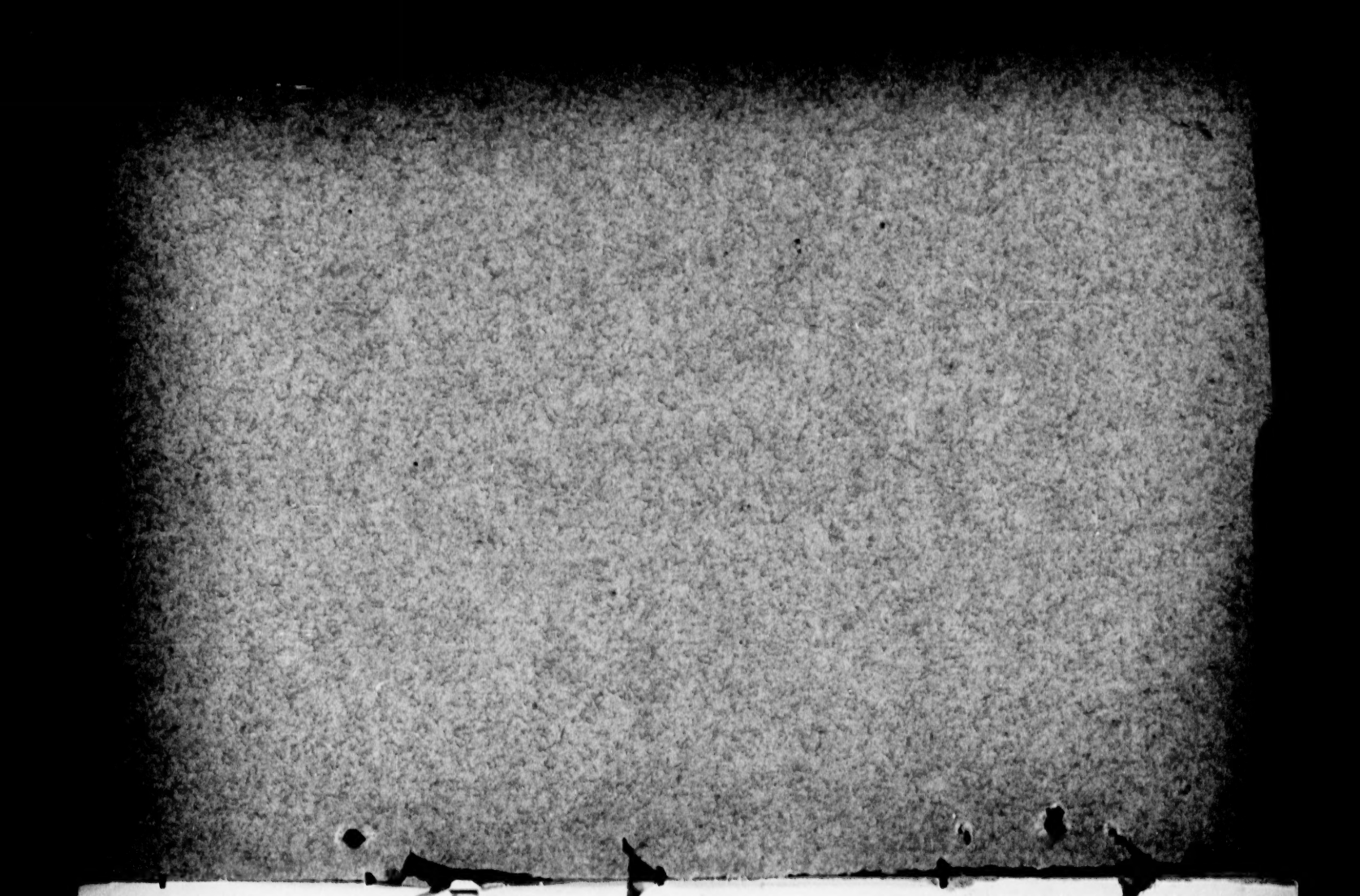
Was the Curative Act constitutional?

Now comes the question as to whether the act of April 17, 1869, volume 3, 302, was constitutional or not.

That act, so far as it pertains to this point, reads as follows:

"SEC. 2. *And be it further enacted*, That the subscriptions made to the capital stock of said company by the township of Roberts, for thirty thousand dollars, and by the township of Hopewell, in said county, for fifteen thousand dollars, and the several subscriptions heretofore severally made by the townships of Reading, Long Point, Newton and Sunberry, in Livingston county, be each legalized, and are hereby made valid and binding, according to the terms thereof; and the several supervisors of said townships shall issue, in due form, the bonds of their respective townships for the amount of stock subscribed for, according to the terms and conditions of said subscription, and shall deliver said bonds to said railroad company."

Counsel for appellant contends that said act does not come within the bearing of the cases of Marshall vs. Silliman, 61 Ill., 218, and Silliman vs. Wiley, 62 Ill., 70, because, he says, that in those cases there existed no enabling authorizing a subscription at all, while in the case at bar there was an enabling act, but it was not pursued. But this position is certainly not well taken. In that case there was an election held and subscription carried, but there was no enabling act. In this case there was an enabling act, but it was not followed; and, as we have seen, the enabling act was so materially disregarded that it rendered the election a nullity—an utterly void proceeding—according to the uniform holdings of this court. It being, then, an utterly void proceeding, the subscription thereto was utterly void, the very same as the subscription in the case of Marshall vs. Silliman, *supra*, and therefore could not be made



United States Supreme Court.

OCTOBER TERM, A. D. 1879.

THE TOWN OF ROBERTS, *Plaintiff in Error,*

v.

MATTHEW BOLLES and M. SHEPARD BOLLES,
Defendants in Error.

BRIEF AND ARGUMENT.

GEORGE O. IDE,
Attorney for Defendants in Error.

CHICAGO:
BULLETIN PRINTING COMPANY, 113 MADISON STREET.
1879.

United States Supreme Court.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT.

The alleged errors in this case are embraced in the first, second and third assignments of errors. The first alleges that the Circuit court erred in sustaining a demurrer to the pleas of the Town, numbered one, three and four. The second assignment alleges that the court erred in admitting in evidence the six municipal bonds, declared upon, because these bonds were not endorsed in writing by a certain corporation therein mentioned. The third assignment alleges that

the court erred in rendering judgment upon these bonds against the Town.

No error is assigned as to the admission in evidence of the twenty-two coupons mentioned in the seventh count of the declaration; and in fact the bill of exceptions shows that no objection to their being read in evidence was made on the trial below, and that no defence to them was offered under the fifth plea, or plea of the general issue, pleaded to the seventh count.

The plaintiff's case and declaration were in assumpsit, because the written instruments sued upon are not under seal, and because the Practice Act of Illinois permits assumpsit to lie even upon sealed instruments. Six counts of the declaration declare specially upon six municipal bonds, dated April 7th, 1871, and maturing on April 7th, 1874. These counts are precisely similar, except that each count is upon a separate bond, differing from the others in its number only. The seventh count is upon coupons or interest warrants, detached from the bonds of the town of the same issue, and contains also the common money counts.

Each bond with its recitals is set out at large in the count upon it. There are averments that the town had the power to issue the bonds by virtue of certain acts of the legislature of Illinois, whose titles and dates are mentioned in the declaration; and the recitals are to the effect, that the bonds were issued in accordance with the laws of Illinois, in payment of a subscription made by the town for three hundred shares of the capital stock of the Hannibal, Lacon and Eastern Railroad Company, which subscription was made by the town

by virtue of a vote of a majority of the voters of said town at a special election held for such purpose in said town on the 25th day of March, 1869, in pursuance of the provisions of the laws of the State of Illinois and of the several acts of the general assembly of the State of Illinois incorporating said railroad company.

It is also averred that each bond was drawn payable to the railroad company *or to the bearer of the bond;* also that after the delivery of the bonds by the town the bonds were sold and delivered for value to *bona fide* purchasers in the State of Massachusetts and that the bonds in said State came into the hands of the plaintiffs long before their maturity, in good faith and for value, and that the plaintiffs then became and yet are the lawful bearers and owners; and that by reason of being such bearers, the town had in and by the bonds promised to pay the plaintiffs the moneys, mentioned in the bonds.

The acts of the legislature, recited in the declaration, are the following:

1. An act in force March 7, 1867, entitled, "An act to incorporate the Hamilton, Lacon and Eastern Railroad Company;" found in Laws of Illinois of 1867, 2 vol., p. 654.

2. An act, in force March 5, 1869, entitled "An act to authorize the incorporated towns and townships in the counties of Livingston, La Salle and *Marshall* to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company;" found in Laws of Illinois, of 1869, vol. 3, p. 361.

The plaintiff in error, as alleged in the declaration and not denied, is a town or township, in the county of Marshall, Illinois, its corporate name under the township system of the State being that of Town of Roberts. The legislative acts entitled as above and one other, hereinafter quoted, gave the plaintiff in error the power and authority to subscribe to the stock of the railroad corporation and to issue its bonds in payment to the amount of $100,000. Bonds only to the amount of $30,000 were issued.

The acts referred to read as follows:

An act to authorize the incorporated towns and townships, in the counties of Livingston, La Salle and Marshall to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That any incorporated town or township of any county, through or near which the Hamilton, Lacon and Eastern Railroad Company may be located or about to be located, is hereby authorized and empowered, by a vote of the people of the same, to subscribe to the capital stock of said company, any sum not to exceed one hundred thousand dollars each; which vote of the people shall be ascertained by an election held in the manner prescribed by and in conformity with the provisions of an act entitled, "An act to authorize the counties of Woodford, La Salle and Livingston, and the townships, cities and incorporated towns and corporations in said counties, to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois," approved March 6, 1867.

§ 2. It shall be the duty of the clerk of each township which may have or may hereafter subscribe to the capital

stock to said railroad company, to keep, in duplicate, a complete register of the bonds issued, showing their numbers, amount, date and rate of interest, and deliver one copy of the same to the county clerk of his county.

§ 3. Collectors shall be allowed not to exceed one per cent. on all taxes collected, to pay the interest and principal of said bonds, and treasurers not to exceed one-half of one per cent., for receiving and paying out the same.

§ 4. This act shall be deemed a public act, and be in force from and after its passage.

Approved March 5, 1869.

An Act to authorize the counties of Woodford, La Salle and Livingston, and the townships, cities, incorporated towns and corporations in said counties, to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the counties of Woodford, La Salle and Livingston, and the townships, cities, incorporated towns and corporations in said counties, that now are or hereafter may be organized in said counties, may become subscribers to the capital stock of any railroad that now is or hereafter may be incorporated in this State, and may issue bonds for the amount of such stock so subscribed with coupons for interest thereto attached under such limitations and restrictions and on such conditions as to them may seem right for the best interest of said counties, townships, cities, incorporated town or other incorporation, any all or either of them, and the directors of said railroad company may approve of the proposition for any such subscription, the same having first been submitted to the legal voters of such county, township, city, incorporated town or other corporation, as aforesaid, and approved by a majority of

said legal voters, who may vote upon the question, and upon the application of twenty legal voters and tax-payers of any county, township, city, incorporated town, or of three members of any corporation as aforesaid, specifying the amount to be subscribed, said amount not to exceed the sum of one hundred thousand dollars, for any one such county, township, city, incorporated town or other corporation, to be subscribed for any one railroad company (and the amount that any corporation may vote to subscribe shall be left to said corporation and the railroad company in which said corporation takes stock), and the condition of said subscription shall be set forth in said application, and it shall be the duty of the clerk of any such county, township, city, incorporated town or other corporation, immediately to call an election, by posting up notices at least twenty days, in each township or voting place, in said county, if the vote is to be taken by a county, or if by a township, then by the clerk of said township, in three of the most public places in said township, or if by a city, at three of the most public places in said city, or if by an incorporated town, at three of the most public places in said incorporated town, or if by a corporation, then at the usual places of holding elections in the State for the election of their corporation officers. Said election shall be held for the purpose of determining whether said county, township, city, incorporated town or corporation, shall subscribe to the stock of the railroad company named in said call and notices, and if a majority of said voters, voting at said election, shall be for subscription, then the county court or board of supervisors, having jurisdiction over the county matters of said county, or the corporate authorities of such city, incorporated town, or supervisor of such township, or the president of such corporation shall make, or cause to be made, said subscription to said capital stock of said railroad company, and upon said subscription so voted, being accepted or

received by the directors of said railroad company, shall cause bonds to be issued in compliance with said vote, which bonds shall in no case bear a higher rate of interest than ten per cent. per annum, and said interest shall be paid out of the treasury of the county in which any of the said townships, city, incorporated towns or corporation shall be located, and said bonds shall not be for a less amount than one hundred dollars, each of which said bonds may run for a term of years not exceeding twenty: *Provided*, each county, township, city, incorporated town or corporation may by their votes determine on what part of said railroad their stock, so by them voted and subscribed, shall be expended, and said bonds shall be accepted by said railroad company at their face or at par value.

§ 2. It shall be the duty of the clerk of any township, city, incorporated town or other incorporation, to return the poll-book of said election, so held in such township, city or incorporated town or other corporation, together with a certificate of the result of said election, to the county clerk of the county or counties in which said township, city or incorporated town or other corporation may be located, within ten days after said election. And if a majority of the legal voters of such county, township, city or incorporated town, shall have voted for said subscription, then it shall be the duty of the county clerk of each county in which any such town, city or incorporated town has voted such stock, to annually thereafter cause to be computed 'and extended on the the taxable property, both real and personal, returned by the assessor of each county, township, city, incorporated town or other corporation which have voted to subscribe for any such stock, a sum sufficient to pay the interest on all such amounts so voted and named in the bonds so issued by the respective counties, townships, cities, incorporated towns or other corporations, which tax shall be collected as other taxes, and, when collected, shall be paid into the county treasury as other county taxes.

§ 3. It shall be the duty of said county treasurer to pay out the same, on the presentation to him, of the bonds or bond so issued by any county, township, city, incorporated town or corporation, as aforesaid, the amount due on each of said bonds, as interest, out of any money or moneys in his hands for that purpose, and receive the interest coupons then due, as vouchers for the same. He shall also keep a separate account with each county, township, city, incorporated town or corporation, which account shall at all times be subject to inspection of all persons interested.

§ 4. At all elections for officers, or other questions to be voted upon, by the stockholders, of said railroad corporations, in which said stock is taken, the chairman of the boards of supervisors, the supervisors of said town, the mayor of said city, the president of said incorporated town, and the president of said corporation, or by proxy of either of the aforesaid, shall represent and cast the votes which said stock, so subscribed, is entitled to.

§ 5. It is further enacted, that no mistake in the giving of the notice, or in the canvass, or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds, so issued: *Provided*, that there is a majority of the voters at such election, in favor of such subscription.

§ 6. This act shall be deemed a public act, and shall take effect from and after its passage.

Approved March 6, 1867.

Private Laws of Illinois, 1867, vol. 1, p. 866.

BRIEF.

I.

There was no error in sustaining the demurrer to the first plea, nor in admitting in evidence the municipal bonds declared upon.

I. The same point, raised by the demurrer to the first plea, was fully presented and heard on the trial under the issue made under the second plea. The sustaining of the demurrer was therefore harmless, and forms no ground for error.

Chambers County v. Clews, 21 Wallace 317.
Chute v. Winegar, 15 Wallace 355.

II. The municipal bonds, offered in evidence, were payable to bearer, and negotiable by delivery, and consequently were properly admitted in evidence without any written endorsement of the nominal payee, the railroad company.

1. The promise of the town in the bond is to pay the sum of money mentioned to the railroad company, *or to the bearer* of the bond, on presentation, etc.

2. The uniform and established construction of commercial securities, drawn so payable, is that they are good negotiable instruments, and that their legal title passes to the transferee by delivery merely. In contemplation of law, commercial paper drawn payable to a specified individual or

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2. The uniform and established construction of commercial securities, drawn so payable, is that they are good negotiable instruments, and that their legal title passes to the transferee by delivery merely. In contemplation of law, commercial paper drawn payable to a specified individual or

bearer is solely payable to the person, who is or may become the bearer. There is no difference in this respect between papers, payable to bearer alone, and those payable to a particular person or bearer. Both pass by delivery and no endorsement is necessary.

Bank of Kentucky v. Wister, 2 Peters 319, 326.
Bonnafee v. Williams, 3 Howard 577.
Bradford v. Jenks, 2 McLean 130.
Bullard v. Bell, 1 Mason 243.
Dean v. Hall, 17 Wendell 216.
Seabury v. Hungerford, 2 Hill 83.
Dole v. Weeks, 4 Mass. 451.
Grant v. Vaughan, 3 Burrows 1516, 1524.
Story on Prom. Notes, p. 51, sec. 36 (7th ed).
3 Kent's Com., p. 91, side 78.
Edwards on Bills, pp. 646, 647.
Byles on Bills, 228.
2 Abbot's U. S. Practice, p. 19.

3. The Illinois statute only required an assignment of notes when drawn payable to a particular payee. It does not in terms require a note payable to "bearer" to be endorsed. On the contrary, the 8th section of the statute of Negotiable Instruments expressly provides that the title to such commercial paper shall pass by delivery.

Gross' Statutes of Illinois, pages 461, cap. 73, sec. 4.

Rev. Statutes of Ills., page 719, sec. 8.

4. Prior to the enactment of the 8th section of the present statute, the decisions of the Supreme court of the

State were to the effect that notes payable to bearer were negotiable by delivery, and no endorsement was necessary to enable the holder to sue upon them. Bank notes also, payable to a particular person or bearer, were held to have been negotiable at common law without the aid of any statute, and are not within the operation of the Illinois statute.

McHenry v. Ridgely, 2 Scammon, p. 310.

New Hope Del. Bridge Co. v. Perry, 11 Illinois 468.

5. Municipal bonds are put by the Illinois Supreme court on the same footing as bank bills, and thus like bank bills, though payable to a railroad company or bearer, are transferable by delivery.

Johnson v. Stark County, 24th Illinois 93.

Supervisors of Mercer Co. v. Hubbard, 45 Illinois 143.

Lord Mansfield in *Grant v. Vaughan*, 3 Burrows 1524, said "there was no distinction between a bank note and a promissory note payable to a particular person or bearer;" and Justice Wilmot in the same case held that such was the law antecedent to the statute of Anne.

6. Whether or not the bonds in suit were negotiable by delivery merely is a question of commercial law, in the solution of which this court is not bound by the opinions of the State court.

Supervisors v. Schenck, 5 Wallace 784.

Swift v. Tyson, 16 Peters 18.

Aurora City v. West, 7 Wallace 105.

Township of Pine Grove v. Talcott, 19 Wall. 666.

Decisions of the State court, holding that in a promissory note payable to a particular person or bearer, the words "or bearer" are surplusage and do not import a promise to pay the bearer, erroneously construe the contract and are in conflict with the settled adjudications of this and other courts.

7. In this court, the decisions have uniformly treated municipal bonds, payable to a specified railroad company or bearer as negotiable by delivery merely, so as to vest the legal title in the holder.

Mercer Co. v. Hacket, 1 Wallace 84.
Woods v. Laurence Co., 1 Black 389.
Moran v. Commr's, 2 Black 722–731.
Humboldt Township v. Long, 92 U. S. 643.

And the same rule has been applied to Illinois bonds, issued and sold in the same way without endorsement.

Town of Coloma v. Eames, 92 U. S. 484.
County of Warren v. Marcy, 97 U. S. 96.
County of Randolph v. Post, 93 U. S. 505.
Nugent v. Supervisors, 19 Wallace 244, 253.
Kennicott v. Supervisors, 16 Wallace 459.

II.

There was no error in sustaining the demurrer to the third and fourth pleas. The plaintiffs below were bona fide purchasers of the bonds before due, for value paid, and without notice of the alleged defenses. They were protected by the recitals of compliance with the law, contained in the bonds. They were also vendees of previous bona fide purchasers, as to whom no notice is alleged.

AS TO THE THIRD PLEA.

1. This plea alleges no notice to plaintiffs below of the alleged defense, except the "constructive" notice, alleged to be derived from the presence of certain documents in a town clerk's office and in the private book of a railroad company. It is not averred that the plaintiffs had any other notice than this, nor any knowledge or actual notice whatever of the matters pleaded.

2. The counts in the declaration set out the recitals in the bonds, and averred that the bonds were sold in the market at Boston to *bona fide* purchasers, and that afterwards plaintiffs below became the purchasers and bearers of the bonds before their maturity, for value paid.

3. The plea was bad in not alleging notice to the vendors of the plaintiffs below — the latter were protected by the equities of their vendors.

Commissioners v. Bolles, 94 U. S. 109.
Commissioners v. Clarke, 94 U. S. 278, 283, 286.
Cromwell v. Co. of Sac, 96 U. S. 51.
Woodworth v. Huntoon, 40 Illinois 131.

4. The plea was bad, also, because constructive notice of the kind alleged is no notice to *bona fide* purchasers of unmatured bonds, issued under authority of a legislative enactment by the officers of the municipality, and containing recitals that the law authorizing their issue had been complied with. Behind these recitals, the plaintiffs below were bound to look for nothing except to see that there was previous legislative authority for the town to incur the indebtedness. They

were not required to examine whether the conditions upon which such authority might be exercised had been fulfilled.

Town of Coloma v. Eaves, 92 U. S. 484.
County of Warren v. Marcy, 97 U. S. 96.
Marcy v. Township of Oswego, 92 U. S. 638.
St. Joseph Township v. Rogers, 16 Wallace 644.
Kennicott v. Supervisors, 16 Wallace 452.
Supervisors v. Schenck, 5 Wallace 783, 784.

5. The declaration averred the power, and set out the recitals in the bonds. The plea, not denying the recitals, confessed that they were set out truly. Proof could not be heard to contradict the recitals. The bonds reciting on their face, that they were issued in accordance with the vote and the law, the presumption is that they were issued under the circumstances, giving the requisite authority, and a want of compliance on the part of the town with formalities, required by the statute, cannot be shown as a defense against a *bona fide* holder.

Town of Grand Chute v. Winegar, 15 Wallace 356, 373.
St. Joseph Township v. Rogers, 16 Wallace 662, 665.
San Antonio v. Mehaffy, 96 U. S. 314.
Kennicott v. Supervisors, 16 Wallace 464–465.
Town of Coloma v. Eaves, 92 U. S. 490, 491.
Commr's v. Bolles, 94 U. S. 108.

6. Previous legislative authority was conferred by the legislative enactments, averred in the declaration, and quoted at length in the statement, preceding this brief.

The first section of the act of March 5, 1869, authorized the town of Roberts to subscribe to the capital stock of the Hamilton, Lacon and Eastern Railroad Company any sum not exceeding $100,000. The sum of $30,000 only was voted, and bonds to that amount only were issued.

This act incorporated in it by express reference certain provisions of the act of March 6, 1867. These provisions, by this reference and adoption, became as much a part of the act of March 5, 1869, as if they had been recited at length therein.

The incorporated act provided for an election, and directed, that if a majority of the voters, voting at the election, should be in favor of the subscription, the Supervisor of the town should make the subscription and cause the bonds to be issued.

The fifth section provides, that "no mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds so issued; provided, that there is a majority of the voters at such election in favor of such subscription."

7. The supervisor therefore had the authority to issue the bonds in suit. And this being his duty, it can be gathered from these legislative enactments that it belonged to him to determine whether the election had been held, and whether a majority of the votes cast were in favor of the subscription. As he and the town clerk have passed upon that question and issued the bonds, so reciting, it is clearly too late to question the force and effect of the recitals.

Town of Coloma v. Eaves, 92 U. S. 488, 489.

8. The allegation in the plea of constructive notice is confined to the fact that certain papers were on file in the office of the town clerk, and that the subscription had been given in a certain form to the railroad company. Such matters, under the authorities in this court, did not constitute notice to the plaintiffs below. The purchaser not being bound in law to look or inquire after them, they were not sufficient to put the purchaser upon inquiry and hence did not constitute constructive notice. Nothing short of actual notice or knowledge of these things could affect the plaintiffs below, and this is not alleged.

9. There was no notice on the face of the bonds of the subsequent enactment of April 16, 1869, referred to in the brief of counsel for plaintiffs in error. That enactment was not the previous legislative authority for the issuing of the bonds, and was not the law, at which in connection with the recitals, the plaintiffs when purchasing the bonds were required to look. The previous legislative authority consisted of the acts of March 5, 1869, and March 6, 1867.

Nothing in the recitals referred to the subsequent act of April 17th. The language used shows that the laws referred to were those in force prior to the election. The recitals say that the election was held pursuant to the provisions of these prior laws.

Even if this were not clear, it is plain that the recitals referred to these prior laws, equally as well as to any enactment subsequent to the election. Under such circumstances, on the question of notice, the law is, that where the circumstances relied upon as sufficient to charge a party with notice,

by requiring him to make inquiry, may be equally as well referred to a different matter or claim as the one he is sought to be chargeable with notice of, they will not be sufficient.

Chadwick v. Clapp, 69 Illinois 119.

AS TO THE FOURTH PLEA.

1. This plea alleges matters *en pais*, but avers no notice of any kind to the plaintiffs of the purported defense.

Town of Brooklyn v. Ætna Life Ins. Co., Oct. T., 1878, U. S. Sup. Ct., 11th Vol. Chicago Legal News, p. 319.

2. The plea contradicts the recitals in the bonds, which state that the subscription was made by virtue of the vote had at the election.

3. There is nothing in the enactments, conferring the power to subscribe, concerning the terms of the subscription, nor in what manner it was to be made. Hence the plaintiffs below were not bound to inquire outside of the law and the recitals in the bonds.

4. The plea amounts to a charge of fraud or mistake on the part of the supervisor in making the subscription. The supervisor's acts in conflict with his instructions, do not affect the plaintiffs below.

Town of Brooklyn v. Ætna Life Ins. Co., cited above.

5. It is not averred that the subscription was not made to the same railroad company as was named in the vote, nor is it alleged that any change had been made in the charter or

objects of the railroad company, of a character affecting the subscription voted.

6. It is no defense as against a bona fide purchaser of bonds without notice to say, that the supervisor did not make the formal subscription as the vote required. A formal subscription on the books of the railroad company was not necessary to support the bonds. The vote itself, under these acts, was enough even in a direct proceeding.

Ills. Midland Ry. Co. v. Town of Barnett, 85 Illinois 321–314.

Nugent v. Supervisors, 19 Wallace 247.

ARGUMENT.

I.

The municipal bonds in suit were payable to bearer and negotiable by delivery, and consequently were properly admitted in evidence without any written endorsement of the railroad company, the nominal payee.

It is assigned for error, that the Circuit court erred in admitting in evidence the municipal bonds, declared upon in the first six special counts of the declaration, because they were not endorsed by the railroad company. The same point was made in the first special plea, to which the court sustained a demurrer, but as the same question was fully presented under the issues made on the second plea, the sustaining of the demurrer to the first plea was harmless and forms no ground for error. *Chambers County v. Clews*, 21 Wallace 317; *Chute v. Winegar*, 15 Wallace 355.

If the bonds were negotiable by delivery, no question can be made as to the plaintiffs being *bona fide* holders of the bonds before their maturity for value paid and without notice of any of the defenses alleged. For the findings of the Circuit court, and the bill of exceptions (Rec. 28, 29; folios 51, 53) show that the plaintiffs purchased the bonds and coupons, sued on, in the market at Boston, Massachusetts, in January, 1872, and paid value therefor at the rate of 93½ cents on the dollar, in good faith and without any notice of

any defense thereto, and that these securities were then delivered to the plaintiffs. No evidence to the contrary was even offered.

It is then purely a question of law, arising upon the face of the bonds, from the terms therein expressed, whether or not the delivery without endorsement passed the legal title to the plaintiffs. No such question arises as to the coupons, and none is made in the assignment of errors, since the coupons are payable to bearer alone, without mention of any other payee.

The language used in each bond, in regard to whom the bond shall be paid, reads thus: "The Town of Roberts is indebted to the Hamilton, Lacon and Eastern Railroad Company, *or bearer*, in the sum of $1,000, which the said Town of Roberts promises to pay to the said Hamilton, Lacon and Eastern Railroad Company, *or to the bearer hereof*, on," etc., "at," etc., "on the presentation of this bond," etc. (See Record, p. 4, folio 8, for form of bond.)

It is clear from the terms, used in the contract, that the town undertook to pay the money to the company or to the bearer of the bond, either one, as the case might be. If the company held it, payment was to be made to the company; if any bearer held it, other than the company, the town agreed to pay the sum mentioned to such bearer whoever he might be. It is evident that the promise to pay runs to the bearer, just as much as it does to the company. Under the rules of construction pertaining to notes and commercial securities of this character, whether payable to bearer alone or to an individual or bearer, such papers have uniformly been treated by

the courts as good negotiable instruments, and transferable by delivery merely. Such an instrument "in contemplation of law is solely payable to the person who is or may become the bearer."

Story on Prom. Notes, p. 51, 7th ed.

It is perhaps unnecessary to cite authorities in support of so familiar a rule, unless it be for the purpose of showing that the construction contended for by counsel for plaintiff in error is clearly contrary to the weight of the authorities. Text writers and the courts of the Union, as well as this Supreme court, concur in the construction that promissory notes and bonds for the payment of money, when drawn payable to an individual or bearer, are negotiable by delivery only, and there is no difference in this respect between papers payable to bearer directly and those payable to a particular person or bearer. Both are negotiable, pass by delivery, and no endorsement is necessary. This has long been a settled principle, an axiom in commercial law.

Dean v. Hall, 17 Wendell 216.
Seabury v. Hungerford, 2 Hill 83.
Bonnafee v. Williams, 3 Howard (U. S.) 577.
Bank of Kentucky v. Wister, 2 Peters 319, 326.
Dole v. Weeks, 4 Mass. 451.
Grant v. Vaughan, 3 Burrows 1516–1524.
3 Kent's Commentaries, p. 91, side 78.
Story on Promissory Notes (7th ed., p. 51, sec. 36.)
Edwards on Bills, pp. 646, 647.
Byles on Bills, 228.
2 Abbot's U. S. Practice, p. 19.

Bradford v. Jenks, 2 McLean 130.
Bullard v. Bell, 1 Mason 243.

These authorities, and many more that might be cited, coincide in treating it as a settled principle, that a note, bond, or other commercial negotiable security, payable to a *specified individual or bearer* is negotiable by delivery; that the promise to pay the bearer is as strong as that to pay the payee named; and that it is therefore unnecessary for a holder to prove any assignment or transfer from the specified payee. In such case the right of the holder to sue in the Federal courts, under the jurisdiction clauses of the judiciary act, does not depend on the citizenship of the individual named as payee.

Commercial paper, made payable to "Cowles Meade or bearer," it was held in *Bonnafee v. Williams*, 3 Howard 577, "passes by delivery, and the plaintiffs as bearers have a right to sue in their own names, as the promise to pay is made to bearer." And similarly in *Bank of Kentucky v. Wister*, 2 Peters 326, it is said concerning notes payable to individuals or bearer, "This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

Counsel for plaintiff in error insists, however, that the Supreme court of Illinois have held that a promissory note, payable to "A or bearer," is not transferable by delivery, and that the State statute, in force when the municipal bonds in suit were sold and delivered to the plaintiffs, required such instruments to be endorsed by the railroad company in order to pass the legal title.

The statute referred to (Gross' Stat. p. 461, chap. 73) reads as follows:

SEC. 4. "Any such note, bond, bill or other instrument in writing, made payable to any person or persons, shall be assignable, by indorsement thereon, under the hand or hands of such person or persons, and of his, her or their assignee or assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof, in each and every assignee or assignees successively."

The decisions cited from 17th Illinois 450, and 3d Scammon 385, hold, that in a promissory note, payable to a person by name or "bearer," the words "or bearer" are surplusage, mean nothing, and consequently that the note is payable to the payee named, and his endorsement is requisite to pass the legal title under the statute.

This, we insist, is a construction of the meaning of the contract, and not a construction of the statute. But if it is a construction of the meaning of the statute, it is palpably erroneous and not binding upon this court in a commercial question like the one at bar.

The statute only requires an assignment when payable to a person,—meaning some particular individual named as such payee. It does not say in terms that a note must be endorsed when payable to "bearer."

On the contrary, the same Illinois Statute of Negotiable Instruments, contains another section, in force when this suit was brought, clearly authorizing the legal title of instruments, payable to bearer, to pass by delivery.

That section reads as follows:

"Any note, bond, bill or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof."

Section 8, Rev. Stat. Illinois, p. 719.

Other decisions of the Illinois Supreme Court, made previous to the enactment of this section, however, hold, that when a note is payable to bearer, it passes by delivery and no endorsement is necessary.

In *McHenry v. Ridgely*, 2 Scammon, 310, the court says: "The law is well settled that where a note is payable *to bearer*, or is endorsed in blank, a suit may be maintained in the name of any person who is the holder of the note," and on page 311, "a note endorsed in blank is like one payable to bearer and passes by delivery."

In *New Hope Delaware Bridge Co. v. Perry*, 11 Ill., 468, the same court says, "The principal question in this case is, whether the holder of bank notes, made payable to bearer, or to a *particular person or bearer*, can maintain an action on the notes against the corporation using them." The court, after commenting on the statute in question, holds that the notes were negotiable at common law without the aid of any statute, and decides that "bank notes being negotiable by the common law, by delivery merely, are not within the operation of our statute. The possession of such notes affords *prima facie* evidence of title in the holder; and he is entitled to maintain an action on them, unless it is shown that he obtained the possession *mala fide*."

In *Johnson v. County of Stark*, 24 Ills. 93, the court puts municipal bonds and coupons on the footing of bank bills, and thus within the exception to the statute, made in the case of *New Hope Del. B. Co. v. Perry*, cited above. In the 24th Illinois case, p. 93, this language is used:

"It is also urged, that the plaintiff has no legal title to this instrument, which will authorize a recovery. * * There is no indorsement on the coupon. It seems to be the well settled doctrine, that *State, county, city and other bonds*, and *public securities* of this character, *are negotiable by delivery only, without indorsement*, in the same manner as BANK BILLS, especially when they are payable to bearer. Redfield on Railways, 598, and authorities cited. It is true, that this coupon names no person or payee, nor is it specifically payable to bearer. But the promise is to pay the sum named on the instrument, and it can only be demanded by the person holding it, and precisely as if it was payable in terms to bearer. * * Its legal effect is, that the money is to be paid on the coupon, and to the holder presenting it for that purpose. It then follows, that the holder may sue for and recover the money in his own name."

In *Supervisors of Mercer Co. v. Hubbard*, 45 Ills. p. 143, the court affirms the decision in 24 Ills. 93, and says:

"More recent decisions place these coupons in the condition of *bank bills payable to bearer*, and no one will deny such bills can be given in evidence, *in a suit by the bearer* against the *bank issuing them* under the common counts," (thus evidently referring to the case in 11 Illinois, 468.) "*We*

see no difference between coupons payable to bearer for a sum certain and a bank bill. They alike pass by delivery only."

In *Town of Eagle v. Kohn*, 84 Illinois, 295, the same court, speaking of municipal bonds, says:

"It is the well settled doctrine that bonds of this character are to be treated as commercial paper; and this court has held that coupons attached to them to be negotiable by delivery only, without endorsement."

Lord Mansfield, in *Grant v. Vaughan*, 3 Burrows, 1524, said, "there was no distinction between a bank note and a promissory note payable to a particular person or bearer;" and Justice Wilmot in the same case held that such was the law antecedent to the statute of Queen Anne, citing Hinton's Case in 2d Shower, 235. In *Story on Promissory Notes*, 7th ed. p. 11 (note), it is said, that the Statute of Anne may be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt, to the effect that promissory notes payable to A or bearer, were negotiable by delivery.

Looking at the question strictly in the light of the decisions of the Illinois State court, it sufficiently appears from those decisions:

First. That a bank bill payable to bearer or to a particular person or bearer, as held in 11th Illinois, 468, passes by delivery, and is not within the purview of the statute.

Second. That municipal bonds, like those in this case, stand on the same footing as bank bills, and that the title thereto likewise passes by delivery without endorsement.

Third. That whatever the ruling in the State court may

have been as to ordinary promissory notes, municipal bonds and securities are excepted from the statute by that court, and are treated by that court as such papers are universally treated in all other courts.

According to these rulings, corporate securities, like those involved in this suit, are excepted from the early ruling in 17th Illinois, cited by counsel for plaintiffs in error.

Aside from this exception made by the State court, we urge moreover, that that court in ruling that ordinary promissory notes, payable to "bearer" simply, are not within the terms of the local statute, as it stood before the eighth section above quoted was incorporated into it, but that such notes, drawn payable to "A or bearer," are not payable to bearer, the word "bearer" being treated as surplusage, involved itself in a contradiction and adopted an erroneous construction, which is at entire variance with commercial usage and judicial interpretations the world over. When, as in the case in 17th Illinois, it went so far as to say that a note payable to "A or bearer" is payable to A alone, and that, therefore, an endorsement by A is necessary to pass the legal title, the State court ignored settled principles and asserted a construction of the meaning of the promise, which is palpably unsound and opposed to the great preponderance of judicial authority. It will hardly be denied, that the weight of authority in England and America is to the effect that commercial paper, drawn payable to a specified person or to the bearer, is the same in legal meaning and operation, as if drawn payable to bearer without other designation. Both mean the same thing.

And since the State court holds that the legal title to commercial paper, payable to bearer, passes by delivery without endorsement and is not within the Illinois statute, and since it must be conceded that the bonds in this suit, under the rulings of this court, are to be construed as payable to the bearer the same as if no nominal payee had been mentioned, it ought to follow that these bonds are not controlled by the statute in question, and that in order to vest the plaintiffs below with the legal title no endorsement of the bonds by the railroad company was necessary.

Again: When the legislature of Illinois authorized the defendant corporation to vote and issue the bonds in question, the legislative intent referred to that kind of bonds, which by universal usage and consent have all the qualities of commercial paper. The evident intent was, that the bonds should be negotiable by delivery, as their value would depend upon their ready exchange by manual delivery. Such, for a long time, had been the character given to this class of securities, issued by states and corporations. As was said in *Mercer County v. Hacket*, 1 Wallace 95: "This species of bonds is a modern invention intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. * * A mere technical dogma of the courts or the common law cannot prohibit the commercial world from investing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton

or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition not only in this court but of nearly every State in the Union, is well known and admitted."

We believe that without exception the decisions in this court are uniformly to the effect that municipal bonds, payable to a specified railroad company or bearer, pass by delivery so as to vest the legal title in the holder.

In *Mercer Co. v. Hacket*, 1 Wallace 84, the bond runs to the Pittsburg & Erie R. R. Co. or bearer. In *Woods v. Laurence Co.*, 1 Black 389, to the Northwestern R. R. or bearer; Pennsylvania bonds, held by the State court to be non-negotiable. So in *Moran v. Comrs.*, 2 Black 722, in which, though the bonds were drawn and made payable in Indiana, this court, notwithstanding the statute of Indiana, like the Illinois one, required an endorsement by the R. R. Co., held that the bonds were commercial securities, though not in the accustomed form of notes and bills; that the parties intended them to be passed from hand to hand, and that the legal holder acquired a full title to them (p. 731).

Similarly in *Humboldt Township v. Long*, 92 U. S. 643, the bonds payable to the company or bearer were held completely negotiable.

This court, however, ought not to endorse any such construction of the meaning of the promise, nor of the purport of the Illinois statute, as that contended for by the plaintiff in error, even if the decision of the State Supreme Court should seem to sanction it. Any such construction would be diametrically opposite to that followed by this court for many years and in numerous cases. As this is a question of commercial law, we presume this court will follow its own rulings in the matter and expound the question for itself, uncontrolled by the opinions of the State court.

Supervisors v. Schenck, 5 Wallace, 784.
Swift v. Tyson, 16 Peters, 18.
Aurora City v. West, 7 Wallace, 105.

As was said in *Township of Pine Grove v. Talcott*, 19 Wallace, 666. "The decisions of the highest court of the State to the contrary will not be respected by this court when such decisions are not satisfactory to the minds of the judges, and the matter in question is, bonds issued in a negotiable form, by a township of that State, and now in the hands of a citizen of another State, *bona fide*, and for value paid. *Questions relating to bonds issued in a negotiable form involve questions* relating to commercial securities; and whether, under the constitution of the State, such securities are valid or void, *belongs to the domain of general jurisprudence*."

The same form of municipal bond, with respect to the payee, appears in all the cases on Illinois bonds, which have been before this court. The following cases show that the

bonds in them, like those in the suit at bar, were payable to some specified railroad company or bearer, and that this court treated them as negotiable by delivery:

Town of Coloma v. Eaves, 92 U. S. 484.
County of Warren v. Marcy, 97 U. S. 96.
County of Randolph v. Post, 93 U. S. 505.
Nugent v. Supervisors, 19 Wallace 244, 253.
Kennicott v. Supervisors, 16 Wallace, 459.

These conclusions, we think, are fairly deducible from the authorities:

1. That municipal bonds, made in Illinois, payable to a railroad company or bearer, are as construed by the State court on the same footing as bank bills payable to an individual or bearer, and like them pass by delivery and require no endorsement of the nominal payee.

2. That the State court has classed such bonds as commercial securities, negotiable by delivery as elsewhere throughout the Union, and of necessity excepted them from the purview of the statute.

3. That the State court has uniformly held that commercial paper, payable to bearer, requires no endorsement, and that to such paper the statute in question does not apply.

4. That under the decisions of this and other courts, it is now an axiom in mercantile law, that commercial paper payble to an individual or to bearer, is the same in effect as a promise to bearer alone.

5. That the State court in holding that the words "or bearer" in a promissory note are surplusage, and that there is no promise to pay the bearer, has erroneously construed the

meaning of the contract, and is at variance with the great weight of judicial authority; that this is a construction of the contract and not of the statute.

6. That the promise in the bonds in suit, under the rulings of this court, is a promise to pay the bearer of the bonds, and hence under the established rule in Illinois required no endorsement to enable the holder by delivery to recover upon them.

7. That even if the State court rulings were otherwise, this supreme court is not bound by the decision of the State court on a question of commercial law.

8. That the question raised, as to the negotiability by delivery of the municipal bonds in suit, is of a commercial nature and belongs to the domain of general jurisprudence.

It is suggested that the question discussed under this head is important and far reaching, in so far as Illinois bonds are concerned, as many millions of bonds similar to those in this record have been issued in Illinois, drawn payable to some corporation or bearer, and sold throughout the United States and abroad, by delivery merely, and without any endorsement by the nominal payee. Usage and the commercial world have invariably treated them as negotiable and transferable without such endorsement.

II.

There was no error in sustaining the demurrer to the first, third and fourth pleas. The plaintiffs below were bona fide purchasers of the bonds before due, for value paid and with-

out notice of the alleged defenses, and were protected by the recitals in the bonds of compliance with the law. They were also vendees of previous bona fide purchasers, as to whom no notice is alleged in the pleas. The fourth plea also failed to allege any notice whatever of the matter en pais, set up as a defense.

The only other question presented in the case is, whether or not the Circuit court erred in sustaining the demurrer to the first, third and fourth pleas of the defendant corporation.

THE FIRST PLEA.

1. As to the first plea, the alleged defense is the same as that, made on the trial under the issue joined on the second plea. The same point was raised on the admission in evidence, of the bonds, as fully appears by the bill of exceptions and the findings of the court. (Rec. p. 29, folios 52–53.) The demurrer was properly sustained, if the views advanced in the preceding point of this brief are correct. The question on demurrer to this plea is also immaterial and forms no ground for error, since it was fully presented and disposed of on the trial under the second plea, as this court has held in a similar matter in—

Chambers County v. Clews, 21 Wallace 317.

Chute v. Winegar, 15 Wallace 355.

Junction R. R. Co. v. Bank of Ashland, 12 Wallace 226.

THE THIRD PLEA.

2. The third plea, in brief, alleges that the election, held in the town of Roberts and referred to in the bonds, was not called in strict conformity with the legislative act directing the mode of calling such an election, in this, that the application by the voters to the town clerk was not in the form, and the notice of the election given by the town clerk was not published for the length of time, required by the act; that a majority of the legal voters residing in the town did not vote in favor of subscription; that hence the election was void, and no authority existed to issue the bonds. It is averred, that the application and notice have remained since the election in the town clerk's office, and that the election notice formed part of the subscription, made by the supervisor in the subscription book of the railroad company; and that the plaintiffs had *constructive* notice of this prior to their purchase of the bonds.

The gist of the plea is, not that there was no election held, but that the application and call were irregular; not that a majority of the votes cast at the election were not in favor of subscription, but that this majority did not constitute a majority of all the voters residing in the town; and that the plaintiffs had constructive notice of the alleged irregularities in the election, because the application and notice were on file in the town clerk's office, at a time when the town officers had issued the bonds and allowed them to be put on the market for sale to innocent purchasers, with recitals therein that the election had been had according to law, and the bonds voted and issued pursuant to the laws of Illinois.

The allegation of "constructive notice" means, that the plaintiffs who bought these bonds in the market at Boston, relying upon these recitals, were bound to take notice of certain papers on file in a town clerk's office, a thousand miles away from the place of purchase, and of the entry alleged to have been made in the private books of the railroad, a private corporation. It is not alleged that the plaintiffs had any other notice or information than the constructive notice furnished by certain papers on file in a certain office. It is not alleged that the plaintiffs had any actual notice or information of these papers.

The intendments are taken most strongly against the pleader. He does not use the term notice in the usual way. He saw fit to limit and confine its meaning by the word constructive. The context shows that the language used was intended to refer only to the presence of the designated papers in the town clerk's office as being the notice meant. By express statutes certain things are declared to be notice to the world, such as the recording of deeds, legal notices and matters of a kindred nature, but there is no statute law in Illinois giving such effect to papers in the office of a township clerk.

The allegation, that a majority of all the voters residing in the town did not vote for subscription, amounts to nothing, as the act concerning the election required no such thing, but only a majority of those voting at the election; and a majority of those voting has always been held sufficient.

St. Joseph Township v. Rogers, 16 Wallace 664.
County of Cass v. Johnston, 95 U. S. 368.
Dunnavan v. Green, 57 Illinois 63.

People v. Wiant, 48 Illinois 265.
People v. Warfield, 20 Illinois 160.
People v. Garner, 47 Illinois 246.

Each count of the declaration, to which this plea is pleaded, sets out that the bonds were sold and delivered before maturity, for value, to bona fide purchasers in Suffolk County, Massachusetts, and that afterward through them the plaintiffs purchased and became the owners and bearers of the bonds before their maturity and in good faith for value paid. Each count also sets out the bond declared on at large with its recitals, and avers that the recitals in the bonds are, that "this bond is one of a series, amounting in the aggregate to "thirty thousand dollars, and consisting of thirty bonds, "numbered from 1 to 30 inclusive, each of which is for one "thousand dollars, and all of which are of even date, and are "issued in accordance with the laws of the State of Illinois, "in payment of a subscription made by said town of Roberts "for three hundred shares of the capital stock of the Hamil- "ton, Lacon and Eastern Railroad Company, which said sub- "scription was made by said town by virtue of a vote of a "majority of the voters of said town in favor thereof, at a "special election held for such purpose in said town on the "25th day of March, A. D. 1869, in pursuance of the pro- "visions of the laws of the State of Illinois and of the sev- "eral acts of the General Assembly of the State of Illinois "incorporating said railroad company."

The plea, therefore, was not broad enough to meet and did not answer the allegations of the declaration.

The demurrer was properly sustained to the third plea, because:

First. The plea averred that the plaintiffs only had the alleged "constructive notice." It did not aver that the first purchasers of the bonds, from whom the plaintiffs purchased these securities, had any notice whatever of the alleged defense. No notice to these first bona fide purchasers is charged. The law is, that even if the plaintiffs had notice, yet having purchased the securities from bona fide holders without notice, they are protected by the equities of their vendors.

Commissioners v. Bolles, 94 U. S. 109.
Commissioners v. Clark, 94 U. S. 278, 283, 286.
Cromwell v. County of Sac, 96 U. S. 51.
Woodworth v. Huntoon, 40 Ill. 131.

The plea in this respect was bad in substance, as it assumed to answer the whole declaration, and in fact answered it only in part. A plea which leaves a material averment unanswered is bad on demurrer.

Glickauf v. Hirschhorn, 73 Ill. 574.
Harpham v. Haynes, 30 Ill. 404.
Hogan v. Ross, 13 Howard 182.

Second. The plea was bad, also, because constructive notice of the kind alleged is no notice at all to bona fide purchasers of unmatured bonds, issued under authority of a legislative enactment by the officers of the municipality, and containing recitals that the law authorizing their issue had been complied with. Behind these recitals the plaintiffs were bound to look for nothing, except to see that there was previous legislative authority for the town to incur the indebted-

ness to the railroad company. The plaintiffs were not required to examine whether the conditions, upon which such authority might be exercised, had been fulfilled. There was such previous legislative authority in this case, to the extent of $100,000, of which amount only $30,000 was voted. And the town officers recited in the bonds that the bonds were issued by virtue of a vote of a majority of the voters in the town, at an election held pursuant to the laws of Illinois, one of which is the law authorizing the town to subscribe an amount not exceeding the above mentioned sum.

The principle, that a purchaser of municipal bonds is required to look behind the recitals in the bonds for nothing except legislative authority to issue such securities to railroad companies, and that he is not bound to ascertain whether the conditions concerning the election have been performed, has been so often settled by repeated adjudications in this court, that it would seem almost unnecessary to cite the authorities.

In *Commissioners v. Bolles*, 94 U. S. 108, it is said the question is no longer open for debate. We cite only the cases, in which the principle has been applied to bonds issued in Illinois.

Town of Coloma v. Eaves, 92 U. S. 484.
County of Warren v. Marcy, 97 U. S. 96.
St. Joseph Township v. Rogers, 16 Wallace 644.
Kennicott v. Supervisors, 16 Wallace, 452.
Supervisors v. Schenck, 5 Wallace 783–784.

In the Coloma case, 92 U. S. 484, the record in the cause shows, if the printed report does not, that the point was expressly made and preserved in the bill of exceptions, that

the election documents, on file in the offices of the town clerk and county clerk when the bonds were issued, constituted notice of the want of power to issue them, but this court ruled the contrary.

In the case of *Marcy v. Warren Co.*, 97 U. S. 96, the election was held under a notice given for less time than the statute directed, but this court, declining to follow the previous decision of the State court in the same matter, held that the purchaser was protected by the recitals.

Third. Stating the point in a different way, the plea was not a good plea to a declaration, averring the power and setting out the recitals at large, as it attempted to contradict the recitals, and did not deny, but confessed, that the declaration set them out truly. Proof could not be heard to contradict the recitals. In the language of this court, where the bonds recite on their face that they were issued in accordance with the vote and the law, the presumption is that they were issued under the circumstances giving the requisite authority, and a want of compliance on the part of the town with formalities, required by the statute, cannot be shown in defense against a bona fide holder.

Town of Grand Chute v. Winegar, 15 Wallace, 356, 373.

St. Joseph Township v. Rogers, 16 Wallace 662, 665.

San Antonio v. Mehaffy, 96 U. S. 314.

Kennicott v. Supervisors, 16 Wallace 464, 465.

Town of Coloma v. Eaves, 92 U. S. 490, 491.

Commissioners v. Bolles, 94 U. S. 108.

It is not denied that there was legislative authority in force at the time of the election, under which the bonds in suit were issued.

The act of the legislature of Illinois, referred to, is printed at length in the statement preceding this brief (pages 4, 5).

The first section authorized the town of Roberts, by a vote of its people, to subscribe to the stock of the Hamilton Lacon and Eastern Railroad Company any sum not exceeding $100,000.

There were incorporated in it by express reference, certain provisions of another act of the Illinois legislature, approved March 6, 1867, which latter act is also printed in full in the statement in this brief, and is entitled "An act to authorize "the counties of Woodford, La Salle and Livingston, and the "townships, cities, and incorporated towns and corporations in "said counties, to subscribe to the capital stock of any railroad "company that now is, or hereafter may be, incorporated in "the State of Illinois."

These provisions, by this adoption and reference, thus became as much a part of the act of March 5, 1869, as if they had been recited at length therein, and may be treated as if they had been so recited.

The act thus incorporated, provided for the calling of an election in the county, township, city, incorporated town or corporation, as the case might be, and provides—"and if a "majority of said voters, voting at said election, shall be "for subscription, then the county court or board of super-

"visors having jurisdiction over the county matters of said "county, or the corporate authorities of such city, incorporated "town, or *supervisor of such township*, or the president of such "corporation, shall make or cause to be made said subscrip- "tion to said capital stock of said railroad company, and "upon said subscription so voted being accepted or received "by the directors of said railroad company, shall cause bonds "to be issued in compliance with such vote," etc.

The second section provides also: "It shall be the duty "of the clerk of any township, city, incorporated town or "other incorporation, to return the poll-book of said election "so held in such township, city, or incorporated town or other "corporation, *together with a certificate of the result of said* "*election*, to the county clerk of the county in which said "township, city, or incorporated town, or other corporation "may be located, within ten days after such election."

The fifth section provides: "It is further enacted that no "*mistake in the giving of the notice, or in the canvass, or* "*return of votes, or in the issuing of the bonds, shall in any* "*way invalidate the said bonds so issued; provided that there* "*is a majority of the voters at such election in favor of such* "*subscription.*"

The second section of the act of March, 1869, further provides that the clerk of the township shall keep a complete register of the bonds, and further reference is made to the bonds in the third section.

These two acts when construed together show that it was the intent, that if there was a majority of voters, voting at the elections in favor of subscription, the supervisor of the town-

ship should make the subscription, and issue the bonds. The defendant below, the town of Roberts, is a township in Marshall county, Illinois, under the township system of the State, as alleged in the declaration (Record, p. 3, fol. 7), and not denied in the record. Its supervisor, therefore, had the authority to issue the bonds in suit. And this being his duty, it can be gathered from these acts that it evidently belonged to him, or to him and the town clerk, to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription. As he and the town clerk have passed upon that question and issued the bonds, with a certificate of the town clerk thereon to that effect, and that they have been duly registered by him, it is clearly too late to question the force and effect of the recitals in the bonds. This view of the matter is sustained by the decisions in this court.

St. Joseph Township v. Rogers, 16 Wallace 644, 665.

Town of Coloma v. Eaves, 92 U. S. 488–489.

What was said in this respect by the court, in the case last cited on pp. 488–489 of the report, seems highly pertinent to the state of facts here:

"At some time or other, it is to be ascertained whether "the directions of the act have been followed; whether there "was any popular vote; or, whether a majority of the legal "voters at the election did, in fact, vote in favor of the sub- "scription. The duty of ascertaining was plainly intended "to be vested somewhere, and once for all; and the only per- "sons spoken of who have any duties to perform, respecting

"the election and action consequent upon it, are the town "clerk and the supervisor or other executive officers of the "city or town. It is a fair presumption, therefore, that the "legislature intended that those officers, or one of them at "least, should determine whether the requirements of the act "prior to a subscription to the stock of a railroad company "had been met. This presumption is strengthened by the "provisions of the twelfth section, which make it the duty of "the clerk to transmit to the County clerk a transcript or "statement, verified by his oath, of the vote given, with other "particulars, in case a subscription had been voted. How is "he to perform this duty, if he is not to conduct the election "and to determine what the voters have decided? If, "therefore, there could be any obligation resting on persons "proposing to purchase the bonds, purporting to be issued un- "der such legislative authority and in accordance with a pop- "ular vote, to inquire whether the provisions of the statute "had been followed, or whether the conditions precedent to "their lawful issue had been complied with, the inquiry must "be addressed to the town clerk or executive officers of the "municipality,—to the very person whose duty it was to "ascertain and decide what were the facts. The more the "statute is examined, the more evident does this become. "The eleventh section (quoted above) declared, that if it "should appear that a majority of the legal voters of the city, "town or township, voting, had voted 'for subscription,' the "executive officer and clerk should subscribe and execute "bonds. 'If it should appear,' said the act. Appear where? "Why, plainly, before the subscription was made and the 'bond was executed; not afterwards. Appear to whom?

"In regard to this, there can be no doubt. Manifestly not to "a court, after the bonds have been put on the market and "sold, and when payment is called for, but if it shall appear "to the persons whose province it was made to ascertain "what had been done preparatory to their own action, and "whose duty it was to issue the bonds if the vote appeared "to them to justify such action under the law. *These persons* "*were the supervisor and town clerk.* The right to issue the "bonds was made dependent upon the appearance to them of "the performance of the conditions precedent."

Nearly all of these particulars, commented on by this court in the extract above quoted, are contained in the two enactments, referred to in connection with the bonds involved in the suit at bar.

The town clerk was the officer to call the election.

The town clerk was the officer to return a certificate of the result of the election to the county clerk.

The town clerk also was to make and keep a register of the bonds issued.

The supervisor was directed to make the subscription and cause the bonds to be issued.

The supervisor and town clerk are the executive officers of the township.

From these requirements, it is evident that it was the province of the supervisor and town clerk of the town of Roberts, and their duty to determine whether the statutory requisites to an authorized issue of the bonds in question had been performed. No one besides them or one of them is

designated to do this. They have so determined and so recited in the bonds.

"After all this," to quote again from the Coloma case, page 490, "it is not an open question as between a *bona fide* "holder of the bonds and the township, whether all the pre- "requisites to their issue had been complied with. Apart "from and beyond the reasonable presumption that the offi- "cers of the law, the township officers, discharged their duty, "the matter has passed into judgment. The persons ap- "pointed to decide whether the necessary prerequisites to "their issue had been completed, have decided and certified "their decision. They have declared the contingency to have "happened, on the occurrence of which the authority to issue "the bonds was complete. Their recitals are such a decision; "and beyond those a *bona fide* purchaser is not bound to look "for evidence of the existence of things *in pais*. He is bound "to know the law conferring upon the municipality power "to give the bonds on the happening of a contingency; but "whether that has happened or not is a question of fact, the "decision of which is by law confided to others,—to those "most competent to decide it,—and which the purchaser is, "in general, in no condition to decide for himself. This we "understand to be the settled doctrine of this court."

Town of Coloma v. Eaves, 92 U. S. 490.

Affirmed and declared to be no longer open for debate in *Commissioners v. Bolles*, 94 U. S. 108, and reiterated in *County of Warren v. Marcy*, 97 U. S. 104.

Was there anything on the face of the bonds, that apprized the plaintiffs, when they purchased, that the securities were void?

Let us suppose that the plaintiffs below had presented to them, at the time of their purchase, the bonds and the law authorizing their issue. On examining the law, they would have found that it was in force from its passage by the legislature; that, as shown by the journals of the legislature, it was passed on Feb. 27th, 1869, laid before the Governor for approval on Feb. 28th, and approved by him on March 5th, 1869; that, in the law there were no particular conditions prescribed, besides a popular vote held on a notice of twenty days given by the town clerk, and that it was also expressly provided by the legislature, concerning the election, that "*no mistake in the giving of the notice*, or in the canvass, or return of votes, or in the issuing of the bonds, *shall in any way invalidate the said bonds so issued;* Provided, that there is a majority of the voters at such election, in favor of such subscription."

Examining the bonds, they would have found recited therein over the signatures of the executive officers of the town, the persons authorized to issue the bonds, that the required election had been held in the town on March 25th, 1869, twenty days after the approval of the law; that it had been held pursuant to the law; and that a majority of the voters had voted in favor of the proposition submitted, and that the bonds had been issued by virtue of such vote. However close the time might be between the approval of the law and the election, still there existed the requisite twenty days between

the two events, had the notice of the election been given after the approval and on the same day of the approval. Such notice could have been so given by the town clerk, and what might have been done, the plaintiffs on reading the recitals had a right to presume was done. And that the town clerk could physically do so with ease on the same day is plain, from the fact that the application of the voters, as the third plea avers (Record 23), had been on file with him from February 18th, probably in anticipation of the approval of the law; and further from the fact that all the publication of the notice which the act required, was simply the posting of copies in three public places. Inasmuch as the town authorities had issued the bonds and certified to the world, in effect, that the election had been held in conformity with the provisions of the law, and nothing appeared to show that it was impossible, the plaintiffs were justified in believing these statements to be true and relying upon them, when they purchased these bonds. These recitals, coupled with the legislative declaration that no errors in calling or conducting the election should invalidate the bonds, and the further fact that the bonds had been circulating in the money market from one bona fide purchaser to another, for nearly a year before they came into the hands of the plaintiffs below, without question or cavil on the part of the town, were far better calculated to inspire confidence than to excite surprise in regard to the validity of these securities.

In *Humboldt Township v. Long*, 92 U. S. 644, 645, the question was, whether the bonds were invalid because of the fact that the election was held within less than thirty days after the day of the order calling it. And it was held:

"It is plain that the bonds are not invalid, because all "the notice of the popular election was not given which the "legislative act directed. The election was a step in the "process of execution of the power granted to issue bonds in "payment of a municipal subscription to the stock of a rail-"road company. It did not itself confer the power. Whether "that step had been taken or not and whether the election "had been regularly conducted with sufficient notice, "and whether the requisite majority of votes had been cast "in favor of a subscription and consequent bond issue, were "questions which the law submitted to the Board of County "Commissioners, and which it was necessary further to "answer before they could act. In the present case, the "board passed upon them and issued the bonds, asserting by "the recitals that they were issued in pursuance of and in "accordance with the act of the legislature. Thus the "plaintiffs below took them, without knowledge of any irreg-"ularities in the process through which the legislative author-"ity was exercised, and relying upon the assurance given by "the board, that the bonds had been issued in accordance with "the law. In his hands therefore, they are valid instru-"ments."

The allegation in the plea of constructive notice, as framed, is confined to the bare fact that certain papers were on file in the office of the town clerk, and that a subscription had been given in a certain form to the railroad company. It is alleged that plaintiffs below were bound to take notice of this, without any actual notice of the alleged facts being given to them when they purchased. From the authorities in this court, cited above, it is apparent that documents in a town

clerk's office do not alone constitute notice. And as to the entry in the private subscription book of the private corporation, that being purely an extraneous fact, it is evident that nothing short of actual notice or knowledge of it could affect a purchaser.

We insist, therefore, that the plea as framed charges notice from the mere presence in the town clerk's office of the election application, and notice; that nothing more being alleged as to them, such a plea to a declaration with the averments mentioned was clearly bad on demurrer.

But, if it is insisted that the plea means more than this; that, in effect, it charges that the plaintiffs had notice by the recitals on the face of the bonds, the question then, whether there was such notice, is a question of construction, and must necessarily have been determined by the court as matter of law. *Goodman v. Simonds*, 20 Howard, 365. It was not a question of fact for a jury.

"Constructive notice is a legal inference from established facts; and when the facts are not controverted, or the alleged defect or infirmity appears on the face of an instrument, and is a matter of ocular inspection, the question is one for the court. Whether, under a conceded state of facts, the law will impute notice to the purchaser is not a question for the jury."

Burdsall v. Russell, 29 N. Y. 220.

The facts, alleged in the declaration, and those well pleaded in the pleas admitted by the demurrer, presented the question as one of law for the court.

Counsel for plaintiff in error asserts in his brief, that the defendants here had notice, at the time of their purchase, of the illegality of the bonds, from the fact that on April 17, 1869, the legislature passed an act legalizing the election and directing the supervisor to issue the bonds. The act referred to is quoted by him in his brief, on page 17. This act, he says, has been declared unconstitutional and void.

If it was void, then it was not legislative authority for the issue of the bonds, and no purchaser was bound to look to it for such authority on examining the bonds. To him, without direct information concerning it, it would be as if it had never appeared under the form of an enactment. While the original authority remains in force and unchanged, and the election is recited to have been held, and rights have been acquired under them, he is not required to hunt for subsequent authority—subsequent to all this—to see whether they will inform him of something at variance with the recitals. He is bound only to read the bonds and the existing law antecedent to the election, authorizing the popular vote. That authority in this case was the act of March 5, 1869, and the act incorporated into it, heretofore referred to. Finding such authority to vote at least $100,000 in force, and being informed by the recitals, that the conditions as to the election had been complied with, and relying upon the decisions of this court that the existence of such previous authority and such recitals were sufficient to justify and protect him in purchasing the bonds, it would be extraordinary to require him to hunt through volumes for subsequent session laws of the State of Illinois, in order to ascertain

whether or not since the election something else had not been done by the legislature, which might apprize him of something that he was not legally bound to inquire after.

To require the purchasers of negotiable securities in a distant money market to take notice of legislative enactments, which are void and have been passed since the election and the making and acceptance of the subscription, which one of the pleas alleges was made on March 31, 1869, and which in no wise repeal or alter the original authority, but are intended to sustain the previous proceedings, is to ask of such purchasers the exercise of a degree of extreme prudence, which is at once unusual and unnecessary. The case, cited by counsel from 29 N. Y. 220, decides nothing contrary to this view, but on the other hand sustains it. That was a case concerning alleged alterations in the numbers of bonds, and it was there held:

"The purchaser of a bond or other negotiable instru-
"ment in open market, and in the usual course of business,
"is not bound to make a close and critical examination to
"escape the imputation of bad faith in the purchase. * *
"The rights of a purchaser are not to be affected by con-
"structive notice, unless it clearly appears that the inquiry
"suggested by the facts disclosed at the time of the purchase,
"would, if fairly pursued, result in the discovery of the de-
"fect existing, but hidden at the time. There must appear
"to be in the nature of the case, such a connection between
"the facts disclosed and the further facts to be discovered,
"that the former may be said to furnish a clue—a reasonable
"and natural clue—to the latter."

What was hidden to plaintiffs below, when they pur-

chased the bonds, was the existence of any such act as the one of April 17, 1869. Outside of the recitals they were required to look at none but the authority of March 5, 1869. It is not claimed that they knew or were informed of any subsequent act. There was nothing in the original act or in the recitals notifying them of any such act, as the one of April, or leading them to a knowledge of it. There was no natural or logical connection between the act of March and the bonds on the one hand, and the April act on the other; nor was there anything in the pleadings that would warrant any such conclusion. How then can the plaintiffs below be charged with constructive notice of an enactment, to which their attention was not directly called, and which is claimed to be void? How can they be charged with notice of an unauthorized enactment, and which is consequently not a law? It is enough to ask the purchaser to take notice of existing and valid laws, without asking him to inquire after enactments, to which he is not directly pointed, and which in a legal sense by their invalidity furnish no notice whatever.

Nothing in the recitals in the bonds referred to the subsequent act of April 17th. It is not specifically named. The language used does not refer to it. The language used, "issued in accordance with the laws of Illinois," is a general expression, and evidently refers to the acts of March 5, 1869, and the incorporated act of March, 1867, which gave the power and pointed out the manner of voting and issuing the bonds. "In payment of a subscription," etc., and "by virtue of a vote," etc., "at a special election *held*, etc., *in pursuance of the provisions* of the laws of the State of Illinois and

of the several acts of the general assembly of the State of Illinois incorporating said railroad company. These acts of incorporation thus referred to were the act of March 7, 1867, and an amendment thereto in force March 5, 1869, entitled "An act to amend an act entitled 'an act to incorporate the Hamilton, Lacon and Eastern Railroad' "—found in Ills. laws, 1869, 3 vol. p. 301. The context shows, that the laws thus referred to were those in force, prior to the election. "*Held pursuant to their provisions*," say the recitals. How could the election have been so held, pursuant to the provisions of these laws, unless they were laws enacted and in force before the election? The language used excludes all idea that any subsequent act, like the act of April 17th, is referred to in these recitals.

Such is the obvious and natural meaning of these recitals. Far from giving notice to the purchaser of any subsequent enactment, the recitals direct him exclusively to the laws of the State, which were in force previous to March 25th, 1869, the date of the election. Even if it were not so, it will not be questioned that the recitals referred to these prior laws equally as well as to the subsequent act. Under such circumstances, on the question of notice, the law is that "where the circumstances relied on as sufficient to charge a party with notice, by requiring him to make inquiry, may be equally as well referred to a different matter or claim as the one he is sought to be chargeable with notice of, they will not be sufficient."

Chadwick v. Clapp, 69, Illinois 119.

Plaintiffs below when they purchased, therefore, had no *constructive notice* of the alleged defects in the bonds. There

was no such notice appearing on the face of the bonds. The recitals in the bonds gave them no such notice. They referred to none but the laws in force at the date of the election. They recited that the provisions of these laws had been complied with, and were, therefore, calculated to put a purchaser off his guard rather than to inform him of any risk. The alleged presence of certain papers in a town clerk's office does not, as has been repeatedly held in this court, constitute any such notice. The entry of the subscription in the railroad book was an extraneous matter, resting purely *in pais*.

The facts and circumstances, by which it was sought in the third plea to impeach the title of the plaintiffs below, thus lay outside of the bonds, and the original authority for their issue. They were extraneous to them. The plaintiffs below could not be affected by them, unless it was alleged and proved, that they had *knowledge* of such facts and circumstances at the time of their purchase. Constructive notice, alleged as a matter of law, did not appear from the declaration and plea. The court therefore did not err in sustaining the demurrer.

Goodman v. Simonds, 20 Howard 365.

Nor had the plaintiffs, when they purchased, actual notice of any defect. No such claim was made on the trial, nor is it even alleged in the pleas. It stands proved in the record, that they had no such notice. If their right to recover is defeated, it will be by the application of the doctrine of *constructive notice* merely. This doctrine of constructive notice is entitled to but little favor, and should be construed strictly, particularly when sought to be applied to a purchaser

for value and without any actual notice. In such case, the question becomes one of *fraud* or *bad faith* on the part of the purchaser. Suspicion of defect of title or the knowledge of circumstances, which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat the title.

Cromwell v. County of Sac, 96 U. S. 58.

Murray v. Lardner, 2 Wallace, 121.

"When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence." *Wilson v. Wall*, 6 Wallace, 91–83.

Counsel for plaintiff in error cites the case of *Williams v. Town of Roberts*, as an authority that the bonds in issue here have been declared invalid by the State court. The case does so hold, but on grounds which are not tenable here, and which this court does not follow. The State court in this decision, as it has always done, ignores the effect of the recitals in the bonds, and admits that it is not in harmony with the Supreme court of the United States. The case is not authority here on this question, and cannot be followed in the face of such decisions—all Illinois bond cases—as

Town of Coloma v. Eaves, 92 U. S. 484; *County of Warren v. Marcy*, 97 U. S. 96; *Nauvoo v. Ritter*, 97 U. S. pp. 389–391–392; *Kennicott v. Supervisors*, 16 Wallace 452; *St. Jos. Township v. Rogers*, 16 Wallace 644.

Nor are the other Illinois cases, cited on the other side, of any weight here on this question; as for example, *Harding v. R. R. Co.*, 65 Ill. 90, which is directly overruled by *Warren County v. Marcy*, 97 U. S. 96; and *Marshall Co. v. Cook*, 38 Ills. 44, overruled in *Supervisors v. Schenck*, 5 Wallace 783. And the same remark is applicable to all the other Illinois cases cited, that they are on this question of the relative rights of the bona fide purchaser of bonds, and the municipality issuing such bonds, and of the force and effect of recitals made by the executive officers of such municipality, opposed to the established and long continued decisions of this court.

The case of *Elmwood v. Marcy*, 92 U. S. 289, in this court, is not like the case at bar, and consequently does not control it. In that case there was no previous enactment, no legislative authority for the issue of bonds, which was declared invalid. No power existed. It was sought after the election to cure this want of original authority by a subsequent curative act, conferring this authority for the first time. This curative act was declared invalid. It was not a case, where under an original authority, an election was held but defectively, and the defective execution of the power was aided by a subsequent ratifying enactment. Original power to vote and issue bonds prior to the election was wholly wanting, the town of Elmwood having previously and at a different elec-

tion exhausted whatever power it had; and that the second election was called without any previous authority clearly appears in the case, p. 295.

In the case at bar, however, there was ample authority conferred, previous to the election in the town of Roberts, by the enactments of March 5th, 1869 and March 6th, 1867. The power existed. The election held under it, was not the power itself, but a condition annexed to the grant of the power, as this court has uniformly held—21 Howard p. 544, 545, *Humboldt Township v. Long*, 92 U. S. 645. Hence, the curative act of April 17, 1869, did not confer the power. It simply legalized a supposed defective execution of the power.

We do not consider that the validity of these bonds rests, by any means, upon the legality or illegality of the act of April 17, 1869. For the reasons already advanced, in regard to the recitals, we do not think these bonds can be successfully defeated. In effect, the plaintiffs, as we have urged, are not in a position to be affected by the decision of the State court concerning this curative act.

But under the circumstances of this case, do the same objections apply to this act as in the Elmwood case? Is there not a material difference in principle? Is the decision of the State court on the validity of this enactment, as a curative act, binding here? Many material things may be pointed out, tending to show that the act ought to be sustained and not rejected.

In the first act, conferring the power, it was expressly provided that "no mistake in the giving of the notice" nor

in holding the election, or in issuing the bonds should "in any way invalidate the bonds;" provided a majority at the election voted in favor of the subscription. In the original authority, the legislature plainly declared that the popular vote, a majority, was the substantial thing; that the manner of calling and holding the election, as well as the length of time of posting the notice, although directed, were not essential; but that if departed from the bonds should not be invalidated. This provision formed part of the original grant of authority, and must be considered in connection with it. It shows that the legislature in this case intended to dispense with strict and exact conformity with the methods of calling and holding the election, and that defects and irregularities should not be held fatal. This view of the matter puts the case within the rule, that defects in the exercise of a power and in legal proceedings can be cured, and the proceedings validated, by subsequent enactments. That statutes of this character are valid has been frequently asserted by this court, and needs no illustration. "Mistakes and irregularities are of frequent occurrence in municipal elections, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

St. Joseph Township v. Rogers, 16 Wallace, 666.

Ratification by the legislature cures irregularities in the execution of the power in calling and holding elections.

Beloit v. Morgan, 7 Wallace, 624.

Gelpcke v. Dubuque, 1 Wallace, 206-203.
Thomson v. Lee County, 3 Wallace, 327-328.
City v. Lamson, 9 Wallace, 485.

The decision of the State court, to the contrary, will not be respected by this court, when it is not satisfactory to the minds of the judges, and the matter in question relates to commercial securities. Whether the bonds in question are valid or not, belongs to the domain of general jurisprudence, and on such a question the opinion of the State court is not binding here.

Township of Pine Grove v. Talcott, 19 Wall., 666.

THE FOURTH PLEA.

There was no error in sustaining the demurrer to the fourth plea.

This plea alleges, that at the election it was voted to subscribe to the stock of the railroad company, for the purpose of building a railroad from the City of Lacon, on a certain old grade, through the town of Roberts, to connect with the Chicago, Alton & St. Louis Railroad; and that the bonds should issue when the track was graded, ties laid, the railroad completed and cars running, and a side-track and depot built, etc. It alleges that the supervisor on March 31, 1869, by virtue of the election, subscribed on the books of the railroad company on behalf of the town, for 300 shares of its stock, to aid the construction of the said railroad from Lacon eastward to the Illinois Central Railroad. Avers that the subscription was not made and used in building the Hamilton, Lacon & East-

ern Railroad, from Lacon on the old grade through the town, to connect with the Chicago & Alton Railroad, but was made to aid in constructing the said railroad from Lacon eastward to the Illinois Central and was so used in building a road from Lacon, 16 miles, etc., and that no part has been built to connect with the Alton Railroad; that such subscription and enterprize were fundamentally different, and that hence the bonds are void.

The demurrer was properly sustained to this plea, for several reasons.

1. The plea does not allege *notice of any kind to the plaintiffs* of the purported defense.

2. There is nothing in the acts, conferring the power to subscribe, concerning the terms of the subscription nor in what manner they are to be made. Hence, the plaintiffs were not bound to inquire outside of the law and the recitals in the bonds.

3. The plea contradicts the recitals, which state that the subscription was made by virtue of the vote had at the election.

4. There is no recital in the bonds giving any color to the matter alleged in the plea.

5. The making of the subscription in the books of the railroad company, contrary to the vote, is an extraneous matter, which must be averred and proved to have been *known* to the plaintiffs when they purchased the bonds.

6. The plea amounts at best to a charge of mistake or

fraud on the part of the supervisor in making the subscription.

7. It is not averred that the subscription was not made to the same railroad company, nor that any change had been made in the charter or attitude of the company before the subscription, or at any time, by statute or otherwise.

8. It is no defense, as against a bona fide purchaser of bonds without notice, to say that the supervisor did not make the formal subscription as the vote required. A formal subscription on the books of the railroad company was not necessary to support the bonds. The vote itself under these acts was enough, even in a direct proceeding. *Ills. Midland Ry. Co. v. Town of Barnett*, 85 Illinois 321–314. *Nugent v. Supervisors*, 19 Wallace 247.

In *Town of Brooklyn v. Ætna L. Ins. Co.*, No. 177—Oct. Term, 1878 of this court, it is held:

"The facts set out in the second plea do not constitute a "defense to this action. *It is not averred, in that plea, that "the insurance company had, at the time it purchased the "coupons in suit any knowledge or actual notice*, of the "special conditions embodied in the election notice and re-"peated in the formal subscription. Nor is it therein alleged "that the bonds, to which those coupons were originally at-"tached, contained recitals indicating that the subscription "had been voted and made upon any conditions whatever. "The defendant in error was undoubtedly bound to take notice "of the provisions of the statute under which the bonds were "issued. But it was under no legal obligation to inquire as

"to the precise form or terms of the subscription, whether it "was absolute or only conditional."

"It is now too late for the town to claim exemption, as "against bona fide purchasers, upon the ground that the rail- "road company disregarded its promise to construct the road, "or upon the ground that its own officers delivered the bonds "in violation of special conditions, of which the purchasers "had no knowledge or notice either from the statute or other- "wise. The remedy of the town is against the railroad com- "pany, and its own unfaithful officers, who, it is alleged, "were in fraudulent combination with the company."

11th vol. Chicago Legal News, p. 319.

And in *Town of Eagle v. Kohn*, 84 Illinois 292, it is held that municipal bonds issued in aid of railroads are commercial paper; and where the statute authorizing them does not positively prohibit, "a bona fide purchaser is not required "to take notice of the conditions upon which they were issued, "or the resolutions upon the records of the railroad com- "pany."

None of the cases cited by counsel for plaintiff in error, in his brief under "Proposition 4" sustain this plea. They are not in point and need no comment, as they concern subscriptions made to a different corporation than the one named in the vote, or the legislative enactment. Here, the subscription was actually made to the same corporation to which it was voted, and to which the bonds were issued, but the complaint in the plea is, that the supervisor departed in some particulars from these instructions. All of which is matter

en pais and outside of the matter, which the purchaser is required to take notice of.

The equities of this case are with the defendants in error.

The town voluntarily held an election, and suffered its executive officers to issue the bonds in suit in payment of the subscription made.

The town suffered these bonds to be put upon the market for sale to the public, without objection.

The plaintiffs purchased the bonds in good faith and before their maturity, relying upon the integrity of the official statements, made in the bonds by the official agents of the town, and without any knowledge of the technical defenses, which the town now pleads.

The town should be held responsible for these acts which it has permitted. It is the least innocent of the parties to this suit, and ought, as against bona fide purchasers as are defendants in error, to be held bound by the obligations, which it had the power by law to issue, and which on their face its own officers asserted had been voted and issued by the town, in conformity with the law.

GEORGE O. IDE,

Attorney for Defendants in Error.